SUPREME COURT, U. S.
FILED
NOV 26 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 74-659

OCTOBER TERM 1974

UNITED STATES OF AMERICA,

Respondent,

-against-

JOHN CAPRA, LEOLUCA GUARINO and STEPHEN DELLACAVA,

Petitioners.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

RELEVANT STATUTES, RULES AND REGULATIONS INVOLVED

NEW YORK CRIMINAL PROCEDURE LAW

§ 700.20 Eavesdropping warrants; application

1. An ex parte application for an eavesdropping warrant must be made to a justice in writing, and must be subscribed and sworn to by an applicant.

2. The application must contain:

(a) The identity of the applicant and a statement of the applicant's authority to make such application; and

(b) A full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an eavesdropping warrant should be issued, including (i) a statement of facts establishing probable cause to believe that a particular designated offense has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of the communications sought to be intercepted, and (iv) the identity of the person, if known, committing such designated offense and whose communications are to be intercepted; and

(c) A statement that such communications are not otherwise legally privileged; and

(d) A full and complete statement of facts establishing that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the evidence sought; and

(e) A statement of the period of time for which the eavesdropping is required to be maintained. If the nature of the investigation is such that the authorization for eavesdropping should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable

cause to believe that additional communications of the same type will occur thereafter; and

(f) A full and complete statement of the facts concerning all previous applications, known to the applicant, for an eavesdropping warrant involving any of the same persons, facilities or places specified in the application, and the action taken by the justice on each such application.

3. Allegations of fact in the application may be based either upon the personal knowledge of the applicant or upon information and belief. If the applicant personally knows the facts alleged, it must be so stated. If the facts stated in the application are derived in whole or part from the statements of persons other than the applicant, the sources of such facts must be either disclosed or described, and the application must contain facts establishing the existence and reliability of the informants or the reliability of the information supplied by them. The application must also state, so far as possible, the basis of the informant's knowledge or belief. Affidavits of persons other than the applicant may be submitted in conjunction with the application if they tend to support any fact or conclusion alleged therein. Such accompanying affidavits may be based either on personal knowledge of the affiant, or information and belief with the source thereof and the reason therefor specified.

L. 1970, c. 996, §1, eff. Sept. 1, 1971.

§ 700.40 Eavesdropping warrants; order of extension

At any time prior to the expiration of an eavesdropping warrant, the applicant may apply to the issuing justice, or, if he is unavailable, to another justice, for an order of extension. The period of extension shall be no longer than

the justice deems necessary to achieve the purposes for which it was granted and in no event longer than thirty days. The application for an order of extension must conform in all respects to the provisions of section 700.20 and, in addition, must contain a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results. The provisions of sections 700.15 and 700.25 are applicable in the determination of such application. The order of extension must conform in all respects to the provisions of section 700.30. In the execution of such order of extension the provisions of section 700.35 are applicable.

L. 1970, c. 996, §1, eff. Sept. 1, 1971.

§ 700.50 Eavesdropping warrants; progress reports and notice

1. An eavesdropping warrant may require reports to be made to the issuing justice showing what progress has been made toward achievement of the authorized objective and the need for continued eavesdropping. Such reports shall be made at such intervals as the justice may require.

2. Immediately upon the expiration of the period of an eavesdropping warrant, the recordings of communications made pursuant to subdivision three of section 700.35 must be made available to the issuing justice and sealed under his directions.

3. Within a reasonable time, but in no case later than ninety days after termination of an eavesdropping warrant, or expiration of an extension order, except as otherwise provided in subdivision four, written notice of the fact and date of the issuance of the eavesdropping warrant, and of the period of authorized eavesdropping, and of the fact that during such period communications were or were not

intercepted, must be personally served upon the person named in the warrant and such other parties to the intercepted communications as the justice may determine in his discretion is in the interest of justice. The justice, upon the filing of a motion by any person served with such notice, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and warrants as the justice determines to be in the interest of justice.

4. On a showing of exigent circumstances to the issuing justice, the service of the notice required by subdivision three may be postponed by order of the justice for a reasonable period of time. Renewals of an order of postponement may be obtained on a new showing of exigent circumstances.

L. 1970, c. 996, §1, eff. Sept. 1, 1971.

RULE 8 OF THE DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICT OF NEW YORK

Rule 8. "Free Press—Fair Trial" Directives
[Applicable in Southern District]

(a) It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any ex-

trajudicial statement, for dissemination by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

CRIMINAL RULES

From the time of arrest, issuance of an arrest warrant or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

(2) The existence of contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

The foregoing shall not be construed to preclude the lawyer during this period, in the proper discharge of his official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against him.

Rule 8 U.S.D.C.—SOUTHERN AND EASTERN

During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or

the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case.

After the completion of a trial or disposition without trial of any criminal matter, and prior to the imposition of sentence, a lawyer associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement for dissemination by any means of public communication if there is a reasonable likelihood that such dissemination will affect the imposition of sentence.

Nothing in this Rule is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him.

(b) All courthouse personnel, including among others, marshals, deputy marshals, court clerks, bailiffs and court reporters, are prohibited from disclosing to any person, without authorization by the court, information relating to a pending criminal case that is not part of the public records of the court. The divulgence of information concerning arguments and hearings held in chambers or otherwise outside the presence of the public is also forbidden.

(c) In a widely publicized or sensational case, the Court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury,

the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the Court may deem appropriate for inclusion in such an order.

28 C.F.R. Section 50.2 *Release of information by personnel of the Department of Justice relating to criminal and civil proceedings.*

(a) . . . (b) Guidelines to criminal actions. (1) These guidelines shall apply to the release of informations to news media from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise. (2) At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial, nor shall personnel of the Department furnish any statement or information which could reasonably be expected to be disseminated by means of public communication, if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial. (3) . . . (4) . . . (5) Because of the particular danger of prejudice resulting from statement in the period approaching and during trial, they ought strenuously to be avoided during that period. Any such statement or release shall be made only on the infrequent occasion when circumstances absolutely demand a disclosure of information which is clearly not prejudicial. (6) . . . (7) Personnel of the Department of Justice should take no action to encourage or assist news media in photographing or televising a defendant or accused person being held or transported in Federal custody. Departmental representatives should not make available photographs of a defendant unless a law

enforcement function is served thereby. (8) . . . (9) . . . If a representative of the Department believes that in the fair administration of justice and the law enforcement process, information should be released in a particular case, he shall request the permission of the Attorney General or the Deputy Attorney General to do so.

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM 1974

UNITED STATES OF AMERICA,

Respondent

-against-

JOHN CAPRA, LEOLUCA GUARINO and STEPHEN DELLACAVA

Petitioners

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

John Capra, Leoluca Guarino and Stephen Dellacava, petitioners herein, respectfully pray that a writ of certiorari issue to review the orders and judgments of the United States Court of Appeals for the Second Circuit, entered on July 26, 1974, and September 27, 1974, affirming* and declining to reconsider the affirmance of judgments

*The Court of Appeals also reversed the one count of conspiracy conviction rendered against petitioners and for which they had received concurrent sentences.

rendered against petitioners in the United States District Court for the Southern District of New York on January 3, 1974, convicting petitioners of four counts of substantive violations of the narcotics laws (26 U.S.C. Sections 4705(a), 7237(f); 21 U.S.C. Sections 812, 841(a)(1), 841(b)(1)(A); 18 U.S.C. Section 2) and sentencing petitioners Capra and Guarino to 18 years imprisonment and petitioner, Dellacava, to 15 years imprisonment.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported, appears in the Appendix to this petition. The opinions of the Southern District of New York, not yet officially reported, are reproduced in the Appendix to this Petition.

JURISDICTION

The order of the Court of Appeals affirming the judgments of conviction was entered on July 26, 1974. The order declining to rehear argument was entered on September 27, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Fourth and Fifth Amendments and 18 U.S.C. Sections 2510 et. seq., require reversal of petitioners' convictions of substantive violations of the narcotics laws (26 U.S.C. 4705 and 21 U.S.C. 841), when illegally wiretapped conversations about alleged narcotics dealings

among petitioners were introduced into evidence as admissions by petitioners in the act of narcotic dealings; when the jury was not instructed as to which charges (conspiracy or substantive) this illegal evidence should apply; when these illegally seized conversations comprised the only corroborative evidence of the accomplices' testimony of petitioners alleged narcotics dealings; and when the proof of the conspiracy, plan or scheme which supported the "constructive possession" of which petitioners were charged and convicted was held to have been tainted by the admission into evidence of the illegally seized conversations and testimony of surveillance resulting from those conversations.

2. Whether the Fourth Amendment exclusionary rule and the Fifth Amendment right to due process fair hearing and trial require that where there is uncontradicted evidence that the identity of the chief government witness, his connection to defendants, and their mutual association in a joint criminal venture were discovered by illegal wiretapping, the judgment of conviction should be reversed, or, in the alternative, a hearing held to determine the facts.

3. Whether since no warrant was obtained for the delayed vacuum search and destruction of a gym bag seized five days earlier from petitioner, Dellacava's, automobile and since no warrant had been obtained for the earlier search and seizure of the car, and since no probable cause existed for either search, the Fourth Amendment requires that the evidence thus obtained be suppressed.

4. Whether the illegal wiretapping which lead to the discovery and indictment of the petitioners Capra, Guarino and Dellacava should have caused the entire indictment to be dismissed?

5. Whether the deliberate and avoidable choice by Government authorities to disseminate information which resulted in massive and lurid publicity violated the petitioners' due process rights; and whether the unworthy and discreditable acts of the Government authorities, in this case, inviting members of the press to attend pre-arrest briefings of the police and allowing the press to accompany the police from that circumstance through the post-arrest procedure requires the exercise of this Court's supervisory power to supervise the administration of justice in the Federal Courts, and to dismiss the indictments against the defendant as a result thereof?

6. Whether a warrantless search and seizure (by a Railroad Policeman) of a suitcase owned by petitioners and checked at railroad baggage terminal by them violated their Fourth Amendment rights.

7. Whether the trial court's failure to give limiting instructions throughout the trial upon receipt of evidence of hearsay conversations and acts in furtherance of separate conspiracies, and the court's general and contradictory final charge on this subject, and the government's prejudicial evidence of uncharged crime and separate conspiracies deprived petitioners of their Fifth and Sixth Amendment rights to a fair trial.

8. Whether petitioners were deprived of a fair trial by the government examination of witnesses

which elicited irrelevant and highly prejudicial testimony about non-probative and previously excluded matter and by the use of evidence of minute dust tracings consumed in government analysis.

STATEMENT

In an indictment filed in April, 1973, petitioners were charged with conspiracy and substantive violations of the narcotics laws. The indictment charged a conspiracy between July 1, 1969 and the date of indictment (Count I), and substantive violations in August, 1970 (Count II), on or about November 6, 1970 (Count III), and in October, 1971 (Counts IV and V). The indictment charged various indicted and unindicted co-conspirators, and petitioners were ultimately tried together with three others named as defendants on the indictment, Robert Jermain, George Harris and Alan Morris.

THE WARRANTLESS SEARCH AND SEIZURE OF PETITIONERS' CONVERSATIONS

From December 8, 1971 to February 3, 1972, conversations at Diane's Bar were intercepted by New York City detectives. The Court of Appeals for the Second Circuit held that all of petitioners' conversations intercepted between December 19, 1971 and February 3, 1972 should have been ordered suppressed. (See opinion of the Court of Appeals (Appendix A) Reversal of the conspiracy conviction was mandated, according to the Court of Appeals, by "both the illegal wiretapping after December 19 and the resulting taint of police surveillance and sub-

sequent wiretaps."[1]

These wiretaps, which the Court of Appeals has now held should have been suppressed, provided the foundation for an entire series of wiretaps and surveillance of petitioners through March 26, 1973, less than one month prior to their arrests. Petitioners were provided, prior to trial, with succeeding wiretap and eavesdropping orders and affidavits, which were all built upon the surveillance and conversations monitored pursuant to the Diane's Bar taps and which specifically incorporated by reference the information learned in the original taps.[2] From conversations at Diane's Bar and the consequent surveillance of Dellacava, an order was issued for a tap at Ray's Stationery Store (March 8, 1972), naming for the first time in the order or affidavit, Capra and Guarino. Two extensions (April 7, 1972 and May 8, 1972) were granted on the Ray's Stationery taps. Incorporating the original Diane's Bar conversations and surveillance with conversations and surveillance pursuant to Ray's Stationery, an order issued to tap Steve's Air Conditioning store, next

1. The legality of the interception of petitioner Dellacava's conversations prior to December 19 was left open.

2. There were eleven wiretap or bug authorizations and applications subsequent to Diane's Bar.
1. March 9, 1972—Ray's Stationery Store warrant.
2. April 8, 1972—Ray's Stationery Store warrant.
3. May 8, 1972—Ray's Stationery Store warrant.
4. June 11, 1972—Steve's Air Conditioning.
5. July 12, 1972—Steve's Air Conditioning.
6. August 15, 1972—Steve's Air Conditioning.
7. September 15, 1972—Steve's Air Conditioning.
8. September 18, 1972—for a "bug" at 1023 Havemeyer Avenue.
9. October 18, 1972—for an extension of the "bug" and phone tap.
10. February 15, 1973—for a "bug" in Whitestone, Queens.
11. March 20, 1973—for an extension of the "bug" in Whitestone, Queens.
These were attached to petitioners' moving papers in the District Court. Nos. 8 and 9 (Havemeyer Bugs) are contained in the Appendix to this petition.

to Diane's Bar (June 9, 1972) and two extensions were granted on the Steve's Air Conditioning taps (July 12, 1972 and August 15, 1972). All the affidavits submitted in application for these various orders and extensions refer to conversations and events monitored pursuant to the Diane's Bar taps and surveillance, including the February 3, 1972 Rockefeller Center arrest of Dellacava and Guarino. On September 11, 1972, an eavesdropping order was issued for a social club at 1023 Havermayer Street, based on an affidavit which alleged that the club was a meeting place for petitioners' narcotics dealings. The affidavit, as all the others, incorporated all the preceding affidavits and orders starting from Diane's Bar, and averred, as had all the other orders, that other investigatory techniques had proved fruitless and that bugs and wiretaps were absolutely necessary to the gathering of the evidence in this case. On October 18, 1972, an extension of the Havermayer bug was granted; on December 6, 1972, a physical search warrant was executed on the club, revealing heroin traces, hidden compartments and .38 calibre shells. And, finally, on February 13, 1973, a bug order was issued on premises at 9-20 166th Street in Queens, because petitioners were seen in a "flurry of activity" around those premises.

At the suppression hearings prior to trial, in addition to eliciting the factual circumstances surrounding the illegality of the original Diane's Bar wiretap, counsel for petitioners attempted to establish the direct causal taint from those taps throughout the succeeding Ray's Stationery, Steve's Air Conditioning and Havermayer eavesdropping and surveillance, i.e., that the entire investigation of petitioners, the establishment of their identities, the gathering of the evidence against them, and the connection between them and Joaquin Ramos, the sole government witness against them on the four substantive charges was an exploitation of the illegalities surrounding

the unauthorized, clandestine eavesdropping at Diane's, attained by intentionally misrepresented affidavits, non-minimized monitoring, and listening to unnamed parties without warrant or probable cause.[3] The trial court, however, because the government, in a letter to the Court dated September 7, 1973, stated their intention to use only the Diane's Bar taps at trial, and because the court ultimately found the Diane's Bar taps to be legal, precluded any examination on the issues of taint flowing to police surveillance and investigation arising out of or from subsequent taps.

It was the obvious intention of the Trial Court that a taint hearing would be held *only if* the Diane's Bar wiretaps were found to be illegal and in any event this relief would only be considered *post trial*. Accordingly, as a result of the trial Court's decision upholding the legality of the Diane's Bar wiretap, no taint hearing tracing the flow of information from Diane's Bar to the subsequent wiretaps and surveillance could occur.[4] (1126-29. Numerical references

3. On September 12, 1973, Capra, Guarino and Dellacava stated:

"It is essential that the Court view the balance of the electronic surveillance with regard to his matter . . . to show the overall pattern of unrestrained interceptions and recording." (*Memorandum of Defendants Capra, Guarino and Dellacava at p. 6*).

4. The attempt to trace the investigation subsequent to the Diane's Bar wiretaps was cut off by the District Court. At that time, Detective Eaton was asked whether he commenced an investigation of Ray's Stationery Store after following Dellacava there as a result of wiretap surveillance at Diane's Bar. The Government's objection to questions concerning subsequent investigations was sustained by the District Court. (Court of Appeals Appendix, Vol. 4—p. 1126). Accordingly, no further inquiry was allowed by the Court to trace the taint of the primary illegality alleged and the District Court clearly stated to the defense that it would consider taint

"at a much later time because I don't know what evidence the Government proposes to adduce at the trial. If I order the fruits of this wiretap suppressed, I think the ball is then in the Government's court and it is the Government's obligation to see that none of the fruits obtained directly or indirectly as a result of that illicit eavesdropping is used at the trial." *Id.* at 1127.

are to Volumes II-V of the Court of Appeals Appendix. Numerical references preceded by the letter A are to volume I of that Appendix. Numerical references preceded by the letter T are to the trial transcript contained in Vols. VI and VII of that Appendix.)

As a matter of fact the Trial Court repeatedly overruled counsel's request for a pre-trial taint hearing and envisioned that a taint hearing could only be held post-trial if the wiretaps were suppressed. An example of that colloquy is the following:

> "MR. SLOTNICK: Well, if Your Honor does not suppress and Your Honor is wrong in doing that, then we have a problem back in the Court of Appeals and I hope at least to establish a part record now, where it wouldn't be necessary, if it does happen to send it back down here.
>
> THE COURT: I assume it is going to be reversible error if I fail to suppress this wiretap and it should have been suppressed. I would hope I am not sitting long days and Sundays on something that is liable to be an academic question . . . I think that if that is reversible error . . . we can all fairly predict as lawyers that the Court of Appeals AT A MINIMUM IS GOING TO SEND THE CASE BACK TO HEAR TAINT and all kinds of other things. Therefore, I don't see any reason to anticipate that now and trail all the way through the remote direct or indirect consequences of these taps. So on the grounds I tried to outline for you in the past, I want you to limit this hearing . . . as it affects the question whether the evidence from these taps ought to be suppressed." (1127-1128) (emphasis added).

Subsequently, petitioners again raised the issue with

regard to a TAINT HEARING. As counsel stated:

> "One last thing, and I express confusion at this point, Your Honor indicated that he would hold, if there be a trial and if there be a conviction, any Taint Hearing which will be held at the end on the Trial. That was something Your Honor had mentioned on our first day.
>
> I have submitted some lengthy papers with regard to leads and identity of witnesses and whatever of what I consider illegal taint records and warrants. Will that be held at the end of the Trial or do you want me to mention it specifically now?
>
> THE COURT: . . . What I mean to convey to you is simply that if and when there is a Taint Hearing, it would follow rather than precede the Trial. I don't want you to leave here today or at any time with the understanding that a Taint Hearing is an inevitable feature of your future.
>
> . . . THE COURT: . . . I don't mean to stop for a few days for a voir dire either on Taint problems during the trial. But I do mean to let you preserve that objection on any occasion when you perceive that might be pertinent and it is up to you to reserve it." (1583-1586).[5]

Thereafter, the point was pursued as to the witness Ramos.

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5. Subsequent to the Government's Opening and prior to the Opening counsel stated the following to the Court: "MR. SLOTNICK: I am also constrained for the purpose of the record at this time to move . . . at least suppress as a result of this statement of the Government. It is my belief that most of the evidence will come as a result of tainted sources. THE COURT: All right denied." (27-28.)

> " . . . My chief concern, and I don't think it is a great secret, is that the witness Ramos was discovered as a result of some illegality or some illegality may have been exercised with regard to witness Ramos and I would move to suppress the witness Ramos . . ." (1585-86).

Nevertheless, the Court of Appeals stated in its opinion:

> "There is no indication in the record, nor was there a claim by any of the defendants that the police identified Ramos or asked him to testify as a result of evidence uncovered by the wiretaps . . .". (Appendix A)

apparently overlooking the above portions of the record.

With regard to the motions to suppress the wiretaps and the evidence derived therefrom, the Trial Court determined that if he found the wiretaps to be proper then the Taint Hearing would only be held upon a reversal of his decision which would "*at a minimum*" remand this matter back for a Taint Hearing.[6] The Trial Court's *post-trial memorandum* explaining its reasons for upholding the

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6. The procedure adopted by the District Court holding in obeyance any taint issue until after a decision was made as to the alleged primary illegality, the wiretapping at Diane's Bar comports with that stated in *Alderman v. United States*, 394 U.S. 165 (1969) wherein the case was

> "remanded to the District Court . . . for a hearing findings and conclusions (1) on the question of whether with respect to any petitioner there was electronic surveillance which violated his Fourth Amendment rights, and (2) *if there was such surveillance* with respect to any petitioner, on the nature and relevance to his conviction of any conversations which may have been over heard through that surveillance." Id. at 186: (Emphasis added).

See also, *United States v. Schipani*, 414 F. 2d 1262 (2nd Cir., 1969); *United States v. Maggadino*, Docket No. 73-1933, decided May 2, 1974, p. 3103; *United States v. Paroutian*, 299 F. 2d 486 (2nd Cir., 1962); *United States v. Cole*, 463 F. 2d 163 (2nd Cir., 1972); *United States v. Falley*, decided November 28, 1973, at p. 544).

legality of the Diane's Bar wiretap thereby foreclosed any taint inquiry based on that wiretaps illegality and the consequent illegalities which flowed and tainted the subsequent taps and the information derived therefrom.[7]

The motions submitted by all three petitioners had traced each wiretap and the underlying affidavits which were attached as exhibits. One of those attached and discussed in the motion papers—the Extension of Eavesdropping Warrant dated October 18, 1972, the Havermayer Bug, clearly revealed that eavesdropping conducted on October 2, 1972

> "connects GUARINO, DELLACAVA, CAPRA and others to several kilograms of heroin and cocaine which were seized in Toledo, Ohio in November, 1971." (See Appendix I)

After hearing the conversation of October 1, 1972, Detective Eaton further stated that:

> "Dellacava, Capra, the unknown male, and Guarino have thereby implicated themselves quite strongly in the possession, transfer and sale of several kilograms of heroin and cocaine and of conspiracy to commit those crimes." *Ibid.*

Thus, the first awareness that the Government had that Guarino, Capra and Dellacava had any connection with Ramos concerning any narcotics transactions came as a result of eavesdropping which the Court of Appeals has

7. The Trial Court did, however, leave open the opportunity for any defendant to show taint flowing from later wiretaps which might be defective if "studied for minimization." (Footnote 1 of Memorandum dated December 4, 1973.) The defendants, however, claimed taint not from any failure to minimize any particular wiretap but from the primary illegality of the Diane's Bar wiretap which flowed and supported each succeeding wiretap authorization.

considered to be tainted by the primary illegality of the Diane's Bar wiretap. For, as the Court of Appeals stated:

> ". . . Reversal of the conspiracy count as to Capra, Guarino and Dellacava, is mandated by both the illegal wiretapping after December 19 and the resulting taint of police surveillance and *subsequent wiretaps* . . ." (Appendix A)

It was clear, and the Court of Appeals so found that

> "the defendants contended that if the Trial Court upheld any of these objections (to the Diane's Bar wiretaps), all evidence which was the product of this wiretap should be suppressed." (Id. at A-11).[8]

The pertinent wiretap applications including the major one which obviously lead to the discovery of Ramos were before the Trial Court as exhibits. There can be no question but that the identity of Ramos and his connection with Capra, Guarino and Dellacava were discovered as a result of the conversation overheard at the Havermayer Club on October 2, 1972 (the conversation together with its

8. The motions filed on behalf of Capra, Dellacava and Guarino, traced the illegality of the Diane's Bar wiretaps through each succeeding wiretap ending with bugs which were installed and listened to at 1023 Havermeyer Avenue, Bronx, in September-October 1972 and in a Whitestone apartment in February, 1973. Defendants specifically noted that all of the wiretaps were based upon the original order of December, 1971 and asked suppression "of all of the evidence that flowed therefrom as a result of the original and continuing taint." (Affidavit of Barry Ivan Slotnick, A-52). Guarino's motion attached each of the wiretaps and bugs which were conducted continuously from December, 1971 through February, 1973 and made demand pursuant to Rule 41 E of the Federal Rules of Criminal Procedure "for a hearing in regard to the suppression of the above mentioned evidence *and all evidence resulting therefrom.*" (Emphasis added.) (Affidavit of Dennis D.S. McAlevy at Vol. 1, pp. A-118-119 of the Appendix.) Guarino also claimed that the evidence obtained from the Diane's Bar wiretap was used as a basis for each succeeding wiretap commencing with the wiretap at Ray's Stationery Store and ending with the Havermeyer bug and the Whitestone bug. Id. at 121, 140. In addition, each of the above defendants joined the other in their motions. (Id. at 136-40).

direct flow to Ramos is *prima facie*, the result of listening to the wiretaps).

In an affidavit dated October 18, 1972 which was submitted in support of an application for an eavesdropping warrant at the social club at Havermeyer Avenue, Bronx, New York, Detective George Eaton told the Court that on October 2, 1972, he overheard and recorded a conversation between petitioners Dellacava, Guarino and Capra

> "which in my opinion strongly connects GUARINO, DELLACAVA, CAPRA and others to several kilograms of heroin and cocaine which were seized in Toledo, Ohio in November, 1971. The background of the Toledo seizure has been told to me by a detective who worked on that investigation and is now working on this one". (Affidavit of George Eaton, paragraph 6, Appendix I).

Eaton then quoted what Detective James Nauwens had told him. (See paragraph 6A of Detective Eaton's affidavit). Nauwens had investigated the activities of Joaquin Ramos, Robert Jermain, and Alan Morris between October, 1970 and September, 1972. He was informed by Mel Resnick of the Lucas County, Ohio prosecutor's office of the substance of the testimony at the trials of Morris and Ramos, which trials had ended in the last week of September, 1972. Referring to that trial testimony, Nauwens was informed by Resnick that the train station in which the narcotics was found "is an old ancient-looking building and is not at all a busy station; relatively few trains stop there; relatively few passengers utilize it". (Paragraph 6A of Eaton's affidavit dated October 8, 1972). Nauwens' description of the Union Train Station as told to him by the Ohio prosecutor was clearly an effort to connect the

participants of the conversations overheard on October 2 to the drugs seized in Toledo since. in part of the conversations. petitioner Capra is overheard to say that

> "it looks like 1885. did you ever see the . . . train stops they have . . . nobody. nobody there . . . . Train takes about six people a week." (See paragraph 6B of Eaton's affidavit).

Nauwens further stated that the evidence in the Ramos case

> "involved. in part. photographs which I had taken showing Ramos. Morris. McFadden and others seated together at Madison Square Garden at the Muhammed Ali — Oscar Bonavena fight in December. 1970."

This information supplied by Nauwens was obviously meant to refer to that portion of the conversation wherein Capra is heard to say

> "they let in the pictures from Madison Square Garden. . . . You just see them sitting there. . . . There is no way they can connect Bobby with the photographs. . . . " (See paragraph 6B of Eaton's affidavit.)

Eaton further stated that he was informed by Nauwens of the following:

> "1. RAMOS was convicted in the last week of September. This conversation occurred on October 2nd.
>
> *****
>
> 4. The first People's witness was "the guy from the bag"— the man who whom RAMOS checked the suitcase.
>
> 5. I testified about the Madison Square Garden photographs which were introduced into evidence.

6. RAMOS spoke to the cab dispatcher at length, mentioning that he had to go back to New York because of a sick relative.

7. "BOBBY" JERMAIN was in the photographs which I took; but I did not testify as to who he was, since he was not a party to either of the trials. (There's no way they can connect Bobby with the photographs may be an assumption on CAPRA'S part that because we didn't, we can't.)

8. The Union Station is an ancient building ("looks like 1885"), and is not heavily used ("nobody, nobody there, the fucking train takes about six people a week").

9. DELLACAVA, CAPRA, and GUARINO all make it clear they are discussing the train station in, and a trial which has just occurred in TOLEDO."

Eaton concluded that

> "DELLACAVA, CAPRA the UNKNOWN MALE, and GUARINO have thereby implicated themselves quite strongly in the possession, transfer and sale of several kilograms of heroin and cocaine, and of conspiracy to commit those crimes." (Eaton's affidavit, supra).

Indeed, although Ramos was convicted in Ohio of the Toledo heroin crime in September, 1972, the police surveilling petitioners in New York made no connection between Ramos, the Toledo transaction and petitioners. There was not evidence of any link. In October, 1972, the New York agents overheard the Havermeyer conversation by petitioners about a Toledo bust, consulted the Ohio prosecutor, and one month later in November, 1972, Ramos suddenly began to reveal his connection to petitioners.

Therefore, the Court of Appeals statement that there is no indication the police identified Ramos or asked him to testify as a result of the evidence uncovered by the wiretaps is premature if not incorrect.[9]

Consequently, without the primary illegal overheards the defendants, Capra, Guarino and Dellacava would not have been identified by the Government and their connection to Ramos would not have been disclosed.[10]

THE MINIMIZATION QUESTION OF THE WIRE-TAPS AND THE FAILURE TO GIVE NOTICE

The Government produced Detective Eaton who testified that everything intercepted was recorded, that the

9. Defendants contended in their motions papers:

"A full hearing on this motion to suppress all the evidence received as a result of the illegal overheards . . . will be necessary in order for the defendant to indicate to the Court that his *identity* and *association* was learned by the police as a result of the primary illegal overheard. Therefore, all evidence against defendant is inadmissible because it is the product of an unlawful act and obtained through the exploitation of an unlawful act."

Counsel should have the right to examine the investigating officers so as to identify and trace the unlawful overheard taps and the trial of its fruits.

It is emphasized and reiterated that the enclosed exhibits "B" through "G" reaffirms the defendants' position that can cause this Court only one conclusion—the ultimate suppression of all the evidence gleaned from the primary illegality and the dismissal of this indictment.

II. *Controversion and Suppression of All Eavesdropping Warrants and their Products.*

"The following of leads that were learned about as a result of unauthorizing listening." (Id. at p. 50).

See also, Applications of defendants Guarino and Dellacava found at Court of Appeals Appendix, Vol. 1, pp. 10-24, 27-32, 33-52, 62-63, 118-119, 121-146.

10. The Government conceded that

"the identities of Capra, Guarino and Dellacava were not known to the police when the first order was issued on December 8, 1971." *The Government's Memorandum of Law in Opposition to Motions of Defendants Capra, Guarino and Dellacava* at p. 7.

machines were automatically activated, but could be manually shut off, and that when the machines were not recording, they were not amplifying. Every call was logged. (911-16). The Detective listened to many entire conversations, even though they didn't involve the party named in the order, Joseph Della Valle, or narcotics. (1035-41). On December 9, for example, he transcribed an entire non-narcotic related conversation between Sam and Dennis (1005-06, 1012); on December 10, a lengthy call between Della Cava and his girlfriend (1041); on December 11, a call between Fred and Angelo (1050); on December 13, a call between Mel and Frank (1054); on December 14, a call between Sam and Al Shackter (1064); on December 10, a 10 minute conversation between a husband and wife; a six minute conversation between two females; a three minute conversation involving a wife, child, phone bill and the wife's job as a secretary; a call of over one minute between Della Cava and his son, Carmine; a call between Della Cava and his son, discussing "Mommy" (Eaton knew Della Valle was not married), a December 11 call between a husband and wife; a call on December 12 in which a party said that "Beansy was here", and another between Della Cava and his wife for five minutes; on December 12, between a male who identified himself (not a party named in the order) and a female; on December 12 between Della Cava and his girlfriend; on December 13, a call logged as Beans and his wife; which was not Beans and his wife (1296-1326); on December 16, a call of close to two minutes between a husband and wife, and on December 17, a three minute call between Pete and a female (1520-21).

The Trial Court stated that conversations of under 90 seconds duration would not be considered by it in the tally of statistics with regard to whether or not minimization was reasonably carried out. Counsel objected that duration was not the factor; that the standard was whether the call could

reasonably have been cut-off sooner (1071-72), that a conversation between a husband and wife concerning the purchase of steaks should not have been listened to even for a minute (1287), and that some calls of 20 seconds duration could have been cut off earlier (1290).

Michael Giovannello, a New York City detective, testified that he made a statistical analysis of the tapes. He determined that there were 1561 calls on 16 reels of tape, that 409 of those calls were incomplete; that 728 of those calls were cut-off, that 730 of 1159 calls were monitored in full, and that 235 complete calls involving Della Cava were monitored. (1217-51). The detective made no length check on the cut-off calls (1250). He made no distinctions among the calls (1233) and did not determine at what point in the conversations the cut-off came or whether the parties were about to end their conversation at the point of cut-off (1258). There was no breakdown of Della Cava's phone calls. As to calls monitored pursuant to the December 8, 1971 order, and after December 20, 1971, the following analysis was submitted: 46 calls were made or received by Della Cava; 32 were logged as non-pertinent by Detective Eaton; 20 of those 32 non-pertinent calls were between Della Cava and his wife, son, daughter, girlfriend or lawyer, and 13 of those exceed 1½ minutes in length; all of the 46 calls, including the 32 logged as non-pertinent, with the exception of five calls, were logged and recorded in their entirety; the five non-pertinent calls which were cut-off were a three minute seven second attorney conversation, a minute conversation with a child, a two minute and one minute conversation with DellaCava's girlfriend, and a 40 second girlfriend conversation.

Pursuant to the January 6 order, 144 calls were made or received by Della Cava; 139 were recorded and logged. Detective Eaton logged 108 of those calls as non-pertinent,

and 60 of them involved calls relative to Della Cava's personal and family life. The five calls not logged in their entirety were a minute call, a 15 second call, a six minute call and a 27 second call with a girlfriend, and a 28 second call with an unknown female.

On the requirement of notice, which district attorney Fishman testified was dispensed with orally by the New York State Justice (758-60), the United States Attorney conceded that no actual notice was given until May or June, 1973. (1267).

DISCOVERY OF PETITIONERS THROUGH ILLEGAL WIRETAPPING

The Court of Appeals suppressed all of the intercepted conversations and reversed the conspiracy count as to Petitioners Capra, Guarino and DellaCava and stated that the aforementioned reversal was "mandated by both the illegal wiretapping after December 19, and the resulting taint of police surveillance and subsequent wire taps . . . " The trial record clearly indicated that the discovery and investigation of Petitioners Capra, Guarino and DellaCava resulted from the illegal wiretapping after December 19, and the resulting taint of police surveillance and subsequent wiretaps.

Succinctly, the Court of Appeals summarized the commencement of the investigation and discovery of the Petitioners in the following manner:

> "Meanwhile, at 6:30 P.M., on December 23, the police overheard 'Beansy' call Ray's Stationery in the Bronx and ask for 'Leo' or 'Johnny Hooks'. 'Hooks' answered the telephone and told 'Beansy' to pick up a package. Eaton followed 'Beansy' to a Bronx social club where he saw him take a package

> from a Lincoln Continental and place it in his car trunk. Eaton traced the license plates on both cars and found that the Lincoln belonged to John Capra and that 'Beansy's' was registered in the name of Stephen Dellacava. Subsequent investigation confirmed that 'Hooks' was Capra's alias, that 'Beansy' was Dellacava who tended bar at Diane's, and that 'Leo' was Leo Luca Guarino." (Appendix A).

The testimony during the course of the trial was replete with statements by police officers that, prior to the primary overheard on the illegal Diane's Bar wiretap, the Petitioners Capra, DellaCava and Guarino were not under investigation, were not targets, and were, in fact, relatively unknown to the police officers. In fact, it was indicated by the Government at the trial, that the Petitioners were not known relative to this investigation.[11]

It is further apparent that the other police officers and agents were unaware of the existence of the Petitioners until the discovery by Detective Eaton on the illegal wiretap that ensued at Diane's Bar (77, 1066, 1210-1213, 1293).

In fact, referring to this very event of December 23, where he overheard the conversation of John Capra together with Petitioner Dellacava, Detective Eaton stated:

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11. An example was Detective Eaton's testimony at the hearing, "That's the first time I heard the name 'Johnny Hooks', . . . [or] John Capra . . .

Q. After the 'phone call, you did some surveillance?

A. That is correct.

Q. As a result of that 'phone call and surveillance, you learned about my client, John Capra?

A. Eventually, yes.

Q. As a result of that you learned about a nickname, 'Johnny Hooks'?

A. Yes, that was in the conversation.

Q. And that conversation of 'Johnny Hooks' led you to John Capra, is that correct?

A. That's right." (1094-1096)

"During the course of late December . . . evidence was uncovered which indicated that Stephen DellaCava was acting in concert with Leo Luca Guarino, John Capra . . . to possess, transport and sell narcotics . . . "

This indictment was spun out as a result of the observations and leads furnished due to the original illegally overheard conversations.

THE WARRANTLESS SEARCH OF DELLACAVA'S AUTOMOBILE, APRIL, 1973

On September 18, 1973, testimony was heard on petitioner's motion to suppress evidence (heroin tracings, money, gym bag, and plastic bag heat sealer) seized from his automobile after his arrest on April 13-14, 1973.

David Samuel, a Drug Enforcement Administration agent, testified that on the night of April 13, 1973, he was given an arrest warrant for petitioner Dellacava. The warrant was based on the indictment in this case and was to be executed as soon as possible. The agent and his Group Supervisor, having learned that petitioner was being surveilled at the Batchelor's III Restaurant, proceeded there and met New York City detective George Eaton. Twelve other agents were on hand in the vicinity of the Restaurant to watch for petitioner. (141-142, 168).

After midnight in the area around the Restaurant, there was little automobile or pedestrian traffic; it was generally quiet on the street. Petitioner's car was parked three blocks from the Restaurant. He exited the Restaurant and began walking towards the car. Twice he stopped at phone booths on the way. No one accompanied him, and there were no pedestrians near him. The police were watching him continuously. Agent Samuel could have arrested petitioner at any point along the way to the car, but he decided not to

do so for fear of alerting anyone to the fact of petitioner's arrest. (H. 174, 180).

Petitioner got into his car, and two police cars followed him to 86th and Lexington Avenue, a busy intersection even at 2:05 A.M., where the policemen and agents decided to stop and arrest him, causing crowds to gather and traffic to be blocked. This necessitated that petitioner and his automobile be taken to the New York Youth Club garage under the street in the vicinity of the 79th Street Boat Basin. There, in the presence of the other three law enforcement officers, Agent Samuel advised petitioner of the charges and the rights, but the agent cannot recall if he showed petitioner the arrest warrant. (143-144, 148).

Petitioner was handcuffed there under the street, and the officers proceeded to search the car, including the area under the hood. (203). "At that time, we intended to seize the car—excuse me, impound the car for safekeeping. We couldn't leave it on the street. We searched it for valuables." (144). They did not have a search warrant, nor had they attempted to get one. (213). At that time, Agent Samuel knew only that this particular automobile, registered to petitioner, had been used for petitioner's transportation, although he was professionally curious about what was in it. (175-176, 179). His official report characterized the search as incident to arrest (209), and he testified that such searches were routine procedure to inventory the property against complaints of police pilferage. (145). After the search, the car was left in the boat basin; all four officers left with petitioner. As far as the agent knew, the car was later transported to a United States Government garage where it was kept for about two weeks before it was turned over to petitioner's family. (198, 213).

About ½ hour after the arrest, during the search at the boat basin, one of the other officers found in the trunk a brown gym bag containing $13,999 in cash; Agent Samuel discovered near it a Sears and Roebuck, "Meals in a Minute", plastic bag heat sealing machine. The key to the trunk had been taken along with the ignition key, when the latter was pulled from the ignition. (199-200).

The gym bag was held for four or five days and without a warrant submitted to the laboratory for testing. Traces of heroin were found. (145-146).

The Trial Court ruled that since the issue had not been specifically raised in appellant's motion papers, the failure to take petitioner directly before a magistrate for arraignment would not be considered by the Court. This ruling came, notwithstanding testimony from Agent Samuel, that the arrest warrant directed him to bring petitioner to the magistrate forthwith, that petitioner was not arraigned until the following Monday, and that Agent Samuel made no return on the warrant. (198-220).

George Eaton, the New York City detective who figured prominently in this case throughout was called by the defense. Detective Eaton's first encounter with petitioner Dellacava's name, in relation to the investigation in this case, was in December, 1971, in connection with wiretapping (See *infra*). (234-236).

Eaton corroborated Agent Samuel's testimony that their purpose was to arrest petitioner away from the Batchelor's III area, so as to avoid alerting other subjects of their investigation to the arrest. (257). The key to the trunk of the car was seized directly from petitioner. (267).

On the question of the police authority to search the vehicle, the following testimony and colloquy occurred:

> Eaton: I believe it is police department and federal procedure, when you search a vehicle you have to

inventory any valuables inside the car. (268).

Q.: So all you are telling us now is that it is your belief that under city procedures this would have been all right to make an investory search; is that right?

A.: It would have been required.

Q.: But you can't tell us where you got that authority from?

Objection from the prosecutor.

Court: I wish you would go on to something else . . . I don't want to hear anymore about New York City law. (269-270).

THE WARRANTLESS SEARCH AND SEIZURE IN TOLEDO

On October 28, 1971, a warrantless search of a suitcase checked at the Toledo, Ohio Railroad Terminal resulted in the seizure of approximately five and one-half kilograms of heroin and one kilogram of cocaine. This evidence was introduced at the trial over defense objection and after motions to suppress by the defendants, Guarino, Della Cava and Capra, had been denied. (2239-2347).

The circumstances under which the suitcase was found were testified to prior to trial by Melton Julert, Charles Sibold, Albert Blevins and George Ryan.

On October 20, 1971, Melton Julert was working as "baggage agent" for the Penn Central Railroad at its terminal in Toledo, Ohio. At about 11:15 A.M., a man[12] came to the baggage checkroom and checked a "black or charcoal gray suitcase." Julert made out the baggage check and collected 50 cents from the man who said "he would pick (the bag) up in a day or two." While Julert tried to persuade the stranger to check the valise in a key-locker

12. Identified by Julert and Sibold as Ramos.

elsewhere in the depot, the stranger insisted that the case be held in the baggage room itself.

Later on, Julert picked up the valise and for a "fleeting" moment he supposed there might be a bomb in the bag and he "shook it back and forth". All he heard was some "rustling". (1334, 1336). Julert was scheduled to be off on the following two days (until Saturday, October 23) and told his assistant, Charles Sibold that he had put the bag in the knee-hole part of his desk, just in case the owner came for it while he was away. When no one had come to claim the valise by the following Wednesday (October 27), he became worried that the bag would "come up missing". He discussed the matter with his assistant, Charles Sibold, and it was agreed that they should notify the Penn Central Police Department. (1336, 1337). His main concern was that the bag was not being kept under truly secure conditions and could be lost—especially at night after he was gone. After he shook the valise, he did *not* believe it to contain explosives—but he was "curious" about its contents. He wanted the Railroad Police only to watch the bag—and he had not given any thought to opening it up. (1351-56, 1360-61, 1361, 1374). Julert stated that, had the bag been lost, the Railroad's limit of liability would be $25.00. (1379).

Charles Sibold testified that, on October 20, 1971, the Toledo terminal baggage master, Melton Julert, drew his attention to a grip checked that day instructing him to charge 50 cents per day for storage. Julert was in charge of the baggage room. On the following Saturday (October 23, 1971) the valise was still there and he "picked it up and shook it". The bag was heavy and its contents made a "swishing sound". (1434-36, 1446).

On Tuesday, October 26, 1971, the bag was still not claimed and Sibold suggested that he or Julert "contact the

Penn Central police department captain, Al Blevins". Sibold had understood that the bag would be checked for only a day or two. He became "suspicious" of the bag in view of its weight which indicated to him that it had to contain something other than clothing. When Sibold was unable to speak to Captain Blevins that day, he vainly attempted to open the suitcase by himself. (1435-38).

On the following day, October 27, 1971, Sibold went to the Railroad police office and saw Captain Blevins, stating that he "wished to have the grip opened". He told Blevins he was "suspicious" of the bag. Then both he and Captain Blevins attempted to open the valise—without success. Blevins said he would try to get someone to open the case. On Thursday, October 28, Captain Blevins told Sibold that he had "some *gentlemen* coming down from the Toledo Police Department to try to open the case". (emphasis added.) (1438-39, 1450, 1453). He also told Sibold that if the owner of the valise showed up before the city police got there, to get a physical description of the individual and to require him to sign the baggage check in order to secure a handwriting specimen. Sibold was further instructed by Blevins to take the license plate number of the man's automobile. (1455-56).

At 3:15 P.M. on October 28, Captain Blevins appeared with three Toledo policemen. In the rear of the baggage room, the "police officers started making attempts to open" the valise, using such items as a screwdriver, a pick, a key and paper clips. Blevins got the officers some paper clips to use as a device to open the satchel. The Toledo police officers finally managed to unlatch the grip—giving the same over to Sibold to actually open and spread the bag. In fact, after having sprung the locks, the Toledo officers "told" Sibold "to open" the suitcase. (1440-41, 1457, 1459-61, 1468-69, 1476).

On October 27, 1971, Albert Blevins was an Ohio State commissioned railroad policeman for the Penn Central Railroad at Toledo. (Blevins wears a badge stating on its face "State of Ohio" which also bears the Ohio State seal.) He testified that on that day, Charles Sibold told him about a suitcase that had been checked under suspicious circumstances. Sibold explained to him that the bag was supposed to have been picked up within two days of its being checked on October 20, 1971, but the "man" had not yet come for the satchel. Blevins said that Sibold was concerned that the bag "possibly could contain explosives."

Blevins "hefted" the valise and heard a "rustling" sound—like a "plastic bag", and the case was heavy. Blevins agreed with Sibold that the circumstances were "suspicious" and to aid in the opening of the bag. The suitcase could not be opened, however, and Sibold asked Blevins to "get . . . assistance in unlocking the satchel. Blevins came up with a Samsonite key which did not work. He was "curious" about what was in the bag. He believed it had the makings of a bomb in it—based upon a similar experience in Cleveland. (1388-89, 1398, 1400).

Blevins then decided to call his "primary contact" in the Toledo Police Department (Detective George Ryan) for help. Ryan was the police officer of the City of Toledo he regularly called upon as his official police liaison. He described the problem to Detective Ryan who showed up the next day (October 28) with two other Toledo police officers (Beavers and Bedal). (1390-92, 1417).

While claiming that he had no idea at the time as to what the suitcase contained, Blevins acknowledged that both Detective Ryan and Detective Beavers were narcotics officers in the Metropolitan Drug Unit. Officer Bedal, with the help of clips supplied by Blevins, and other instruments

brought by Bedal, managed to open the locks. Blevins acknowledged that, in his capacity as a "captain of the railroad police" he was "interested in what was inside the bag." He wanted to know what was in it—no matter whether it contained makings of a bomb or something else. And he did aid Officer Bedal in opening the locks. (1333, 1343, 1351-53).

George Ryan, a Detective in the Toledo Police Department, often had contact with Captain Blevins of the Penn Central Railroad police in order to "facilitate his work and cut some of the red tape in connection with the (Toledo police) department." On October 27, 1971, Captain Blevins told him he suspected the valise contained bomb materials. Blevins said he wanted the bag opened for that reason. (1479-80, 1488-91).

Ryan tried to get some keys from the Toledo Police Department Property Clerk, but the keys had been thrown away. He was referred to another police officer—Bedal—who had some knowledge of opening locks. Detective Ryan saw Officer Bedal and made an appointment with him to go to the Railroad Terminal. (1480-81).

Ryan had also asked his superiors to supply him with a third policeman to assist at the Terminal and luckily he was able to enlist Detective Beavers (also a narcotics officer) for the task as both he and Bedal left police headquarters. He was going to the Terminal to "assist a *fellow* officer" (Sgt. Blevins). (emphasis added) (1481, 1486-87, 1491, 1500).

The three officers, (Ryan, Bedal and Beavers), met Captain Blevins at the Railroad Terminal and, along with Mr. Sibold, went to work on the suitcase in a rear area. Officer Bedal worked with a screwdriver and a pick he had brought along with him. Paper clips were needed to work the locks—which Captain Blevins and Sibold provided. Detective Ryan helped Officer Bedal with a screwdriver

while Bedal utilized a paper clip to breach the lock. (1482-83, 1493, 1505).

After Sibold threw open the suitcase, Detective Beavers reached down and picked up one of the plastic bags. Prior to the opening of the plastic bag, Ryan had no suspicion as to what was inside. The contents of the opened valise were still partially covered. Only after Detective Beavers had reached into the valise, had picked up one of the plastic bags and had opened the bag—which he then showed to Ryan—did Ryan suspect that drugs were involved. No action was taken at that point, or at any time thereafter, to procure a search warrant. (1484, 1497-99, 1507).

Petitioners, Guarino, Capra and Della Cava, were required by the trial Court to give testimony with regard to their standing to suppress the evidence gained from the aforesaid search even though they had filed affidavits alleging ownership of the suitcase on the date of the search.

Guarino, filed an affidavit together with Capra, in which each adopted the statement in Dellacava's affidavit that

> "the bag which was searched by the police in Toledo was owned by me together with the defendants, Capra and Guarino, at the time of the aforementioned Toledo search and seizure." (A-143-46)

The trial Court required that this statement, sworn to by Guarino, Capra and Dellacava, be subjected to cross-examination by the Government. On September 17, 1973, the three testified in detail to the formation of a partnership with Joaquin Ramos whereby they all agreed to place a suitcase in the Toledo railroad terminal baggage room containing 6 kilos of heroin and 1 kilo of cocaine for eventual delivery to a buyer known to and arranged by Ramos (2-92).

Ramos had approached Guarino with the opportunity to sell a large quantity of narcotics to buyers known to Ramos. Guarino discussed the terms of the deal with Ramos at Ramos' house and decided that since all of the money was not to be paid in full prior to delivery, all four should share in the profits equally as partners. Ramos agreed and undertook the responsibility to deliver the narcotics to Toledo. Della Cava, a partner with Guarino and Capra in other legitimate enterprises (a bar and restaurant), purchased a suitcase in a local department store in New York from joint funds. Capra packed the narcotics in the suitcase and gave it to Della Cava who gave it to Ramos. Ramos was to take the suitcase to Toledo.

On October 20, 1971, the locked suitcase, purchased by DellaCava, was checked at the baggage counter of the Penn Central Railroad terminal in Toledo, Ohio. On October 28, 1971, before anyone came to claim the suitcase, it was opened and the narcotics seized.

The Trial Court denied the defendants standing to move to suppress the results of the warrantless search of the suitcase.

> The evidence, sufficiently at the suppression hearing and then beyond a reasonable doubt at the trial, showed that these movants, in the particular transaction and in many others, consistently demanded that the payment for their narcotics shipments be "up front", i.e., in advance of shipment and delivery . . . the movants here had been paid in full for their contraband and had no further interest of any kind either in the wrapping—the suitcase—or the contents. (Appendix E)

The Court of Appeals affirmed the Trial Court stating:

> "None of the defendants was able to prove that his reasonable expectation of privacy were infringed by

the search of the suitcase. See *Katz v. United States*, 389 U.S. 347 (1967), and, consequently, each lacks standing to challenge the legality of the search." (Appendix A).

The Court also sustained the Trial Court's holding that the search had been non-governmental since it was not instigated by the government, was motivated by a genuine concern for the safety of railroad property which was engendered by the "unusual" check of the bag, Ramos' nervous behavior, the weight of the suitcase, the delay in claiming it and Captain Blevins' prior exposure to bomb scares. (*Id.*)

MASSIVE AND LURID DISSEMINATION OF PUBLICITY BY THE GOVERNMENT

The Trial Court found:

> "The events leading to the trial in this case included actions by law enforcement officers resulting in massive and lurid publicity for their activities. The Defendants herein were among scores taken in a 'roundup' in the night and morning of April 13-14, 1973. The numerous arrests were supposedly to be accomplished with the utmost secrecy, yet press reporters and photographers were invited to be present, and it worked through all stages of the operation." (Appendix C).

In reviewing the issue raised in the Court below, with regard to the Government's participation in the dissemination of publicity, the United States Court of Appeals for the Second Circuit stated

> ". . . allowing members of the press to attend pre-arrest briefings of the police presents the grave

danger that undue publicity will, in advance of trial, convict the accused in the minds of the general public and seriously prejudice his right to be accorded a fair trial by an impartial jury.

The Government has belatedly stated it will not invite members of the press to these briefings. In the exercise of its supervisory powers, *United States v. Marshall*, 360 U.S. 310 (1959), this Court is of the opinion that the Government must not *allow* the press to be present at such meetings.

The Government's actions did not deny the Defendant due process in this case, but, to insure that future trials are not prejudiced, the Government must not permit their recurrence." (Appendix A).

The facts concerning the "massive and lurid publicity" . . . [surrounding the] 'roundup' are as described below.

During the course of pre-trial hearings, it was suddenly "discovered" that the Government had aided in the dissemination of publicity surrounding a massive 'roundup' of some 86 individuals.[13] During the course of a pre-trial hearing, the Government called *Bernard Gellespie*, a sergeant in the New York City Police Department. (281). Sergeant Gellespie outlined the various procedures that had occurred prior to the arrest of the Petitioner Capra, together with what had occurred at the Capra household, and detailed his arrest. (281-292). He detailed the fact that he was told to report to an auditorium at West 57th Street and when he arrived there, observed a congregation of fellow officers and investigators. It was his best recollection

13. It is noted that this indictment was one of many, and contained the names of only 11 defendants, some of whom may have been alleged to have been involved in another indictment, but apparently unconnected with the bulk of the other indictments.

that at the time he arrived the Police Commissioner of the City of New York was addressing the group. We were all later to learn that this entire congregation was covered by the media—as a matter of fact a photograph of Deputy Commissioner William McCarthy briefing lawmen which also displayed the presence of the Chief Narcotics Prosecutor for the United States Attorney's office appeared in the Daily News [Exhibit "H" For Identification—hearing of September 19, 1973.] Furthermore, The New York Times of April 17, 1973 carried a lead story on Page 1, written by John Corry, who attended the briefing session and observed "during the arrest and raids." The front page carried a picture, without credit, which depicted "a raiding party, with rifles and equipment for breaking down doors beseiz(ing) a Bronx apartment"—counsel alleged that this photograph may have been disseminated by a government photographer and requested that it be the subject of further court inquiry. [To this date we have no denial from the Government.] These, and other exhibits detailing the fact that the mass media was present during the pre-arrest stages and was aided by the government in the dissemination of news regarding this "raid" were attached to counsel's letter of December 24, 1973 and placed before the District Court as exhibits with regard to the Petitioners requests that the conviction be set aside, or alternatively that they be given a plenary hearing in connection with the publicity generated by this indictment through the efforts and/or consent of the government. He further testified that he had seen the head of the narcotics division, together with several others and various directors of the BNDD. (281-290).

On cross examination, Sergeant Gellespie suddenly indicated that the Capra arrest party not only contained himself and another New York City Police Detective, but that he had with him the Deputy Commissioner of Public

Relations, Mr. Kellerman and Mr. Kirkman from the *New York Daily News.* (292-293).

He continued by stating:

"A. Let's see, I had a Deputy Commissioner of Public Relations, Mr. Kellerman, and Mr. Kirkman from the Daily News.

Q. They left with you for the purpose of arresting Mr. Capra. Is that correct?

A. I don't know what their purpose was for being with me, but they were observers.

Q. Did you ask the man from the Daily News what he was doing there?

A. No.

Q. Did anybody explain to you what the man from the Daily News was doing there?

A. No. The head of the Narcotics Division told me that Mr. Kellerman and Mr. Kirkman would be along for the arrest.

Q. Now is Mr. Kellerman a police officer to your knowledge?

A. No, sir . . .

Q. His job is to run the publicity for the New York City Police Department. Is that correct?

A. Yes . . .

Q. And the publicity man and the Daily News reporter were driving the automobile with you. Is that correct?

A. They were passengers in the automobile.

Q. So, again, I ask the question, you were aiding him in obtaining the story for the Daily News?

A. Yes . . .

A. It was understood that it was a joint operation, so it would be best if both city and

federal people be

Q. Including the New York Daily News?

A. Yes, sir. Well, they are with us, so they're there . . .

Q. By the way, by about one o'clock did anybody appear with a camera?

A. Persons had been present with a camera in their automobile". (292-299).

Sergeant Gellespie continued by indicating that a writer for the *New York Magazine*, a photographer for The *New York Times* were also in the area outside the Capra household. (299)

During his appearance in Petitioner Capra's household on the evening of April 13th Gellespie knew that news media people and public relations people were also *inside* the Capra household. (309).

After Mr. Capra was arrested, he was taken to the vehicle of Sergeant Gellespie and driven down to the main offices of the Drug Enforcement Administration at 57th Street, *together with* Mr. Kirkman of the Daily News.

Robert Allen, an agent of the Drug Enforcement Administration testified that he was part of the arresting party assigned to arrest Mr. Capra. (426-427). He testified that he left the conference room containing several hundred people with special agent Sokel and several members of the press, and that he not only spent the evening prepared to arrest Mr. Capra or aid in such, but was also chauffeuring two members of the media. (435-437) Agent Allen proceeded to the vicinity of the Capra household with agent Sokel and his two invited guests. (445-446).

What ultimately resulted was the "massive and lurid publicity" that the Trial Judge so well condemned in the "Memorandum on Pretrial Publicity" issued by the Trial Judge on January 8, 1974.

Agent Allen identified the photograph which appeared on the front page of the Daily News and entered as Exhibit "E" on the hearing.[14] The photograph which covered one-half of the front page of the Daily News had huge bold headlines "INDICT 86 AS BIG DOPE DEALERS". Underneath that headline appeared a large picture of Capra being taken from "his opulent home" . . . to Manhattan during weekend roundup of suspected major narcotic dealers and a picture of Guarino being led from BNDD Headquarters to a waiting bus for transportation to Court. Agent Allen identified Detective Gellespie, special agent Sokel, Detective DeMarco, Capra and himself as being portrayed by the photograph. (450-452). He further identified the pressmen that he "was told . . . would be assigned to our four-man team". It was his recollection that one gentleman was from the New York Magazine and the other from the Daily News[15] (455-456). Agent Allen admitted that the pressmen had been with him in his automobile from the moment he left "the auditorium" to the Capra household and back to the headquarters of the Drug Enforcement Administration. (456).

Subsequent to the testimony of Agent Allen, counsel once again mentioned to the court "the great improprieties with regard to the arrest" indicating that not only "the press" procedure, but the mass arrest procedure was extremely disturbing.

> "I just don't like, being a member of this bar, the mass arrest, the keeping of defendants in-communicado for a period of time. In this case, at

14. Further presented to the court and annexed to counsel's letter of December 24, 1973 in which a request that the conviction be set aside, or alternatively that a hearing be granted was made to the Trial Judge.

15. He testified that the Daily News man had a camera.

least one witness indicated it was at least twenty-four hours, possibly longer, and the witness being an attorney". (494).

The massive publicity that accompanied the arrest of John Capra was merely an example of similar incidents that occurred on the evening of April 13, and contained facts in the news articles which were only known to the prosecution and were released prior to the Petitioners arraignment. The Daily News of April 17, 1973, pages 1 and 3, (Exhibits "E" and "F", hearings of September 19, 1973), depicted John Capra being led from his home after arrest and the story by Edward Kirkman began:

> "(a) An electric bug planted over a year ago in an east Harlem bar led yesterday to the indictment of 86 persons as major drug dealers, charged with supplying a large portion of the heroine and cocaine in the Metropolitan area and as far west as Detroit . . .
>
> Among the top figures arrested on conspiracy charges . . . John (Johnny Hooks) Capra, 33, . . . *reportedly* have overseas drug connections . . ." (Emphasis added).

The entry by reporter Kirkman into the Capra home with the arresting agents resulted in another story carried on page 3 of the Daily News, which, in vivid terms, described the furnishings inside the house and carried alleged statements "of what Capra's wife said to the agents. Defendant Guarino was depicted as he was brought to the offices of the Drug Enforcement Administration. At. P. 3 thereof.

The New York Post of April 16, 1973, reported the arrest as a result of the news conference held by the United States Attorney on the morning of that day. On December 24,

1973, one of Petitioner's counsel wrote referring to the New York Post article:

> "Statements of that press conference are annexed hereto as Exhibit "B" and are astounding as well as highly prejudicial and beyond the bounds of fair comment with regard to this case"—at p. 4.

Counsel outlined other instances of Pretrial Publicity in asking that the court exercise its supervisory power to insure proper standards for federal criminal justice.

> "1. A few days after the arrest, there was television coverage by Geraldo Rivera, of ABC's Eye Witness News of the actual execution of a search warrant for Diane's Bar. Part of the search conducted by BNDD agents was televised and the BNDD agents' comments were carried. It was reported that a white powder was found and that "traps" existed which could be used to store heroine" . . .
>
> 3. Some time after the arrest of . . . [the Petitioners] . . . arresting officer, Gallespie, was interviewed on the television show carried by Manhattan Cable T.V. concerning the arrest and the investigation."[16]

The publicity continued on and invaded the trial (391-431; See also Court Exhibit "2"). Four jurors admitted to reading the article. As each juror was questioned, he commented that there was a recognizable quality about the devastating news story. In fact, one juror commented that the article was "similar" to the proceedings at hand. (T.

16. The articles counsel refer to were appended to his letter of December 24, 1973 and docketed for the perusal of this Court (Court of Appeals Appendix Vol. 1, pages A-96-103).

422). Subsequent to the questioning of the jurors, all counsel moved for a mistrial. (T. 430-431).

Again, towards the end of the trial, an article appeared in the New York Magazine (Court Exhibit "4") which was found on the front page cover of the magazine and substantially into the magazine. Counsel objected and indicated to the Court that the article discussed the indictment of some 91 individuals during the past April with regard to various federal drug conspiracy cases. Counsel further indicated to the Court the similarity of events in the article as to events that occurred at trial. (T. 3080). The Court was told that the aforementioned story contained photographs which were government property and not public record, and were apparently released by some governmental agency. The article further contained interviews with people in law enforcement, including those connected with this case. (T. 3081).

The symmetry and similarity with the case on trial was pressed by counsel.

> "If you blank out the name, you could probably have a transcript of this trial as being rather similar. I would indicate to you that at least, or at most I make a motion for a mistrial based upon the facts in this article released at this unfortunate and inopportuned time". (T. 3082).

It was further requested that the Court grant a mistrial based upon its Supervisory power and "that the government should be sanctioned" for their activities that ran throughout this case.

> "If Your Honor will recollect, during the course of the pretrial hearings, we learned, at least I learned for the first time that a courier from the Daily News was being brought about to historically

> record the arrest of my client, which ultimately resulted in the front page of the Daily News . . .". (T. 3081-3084).

Counsel pursued what he considered to be "the sanction" that should be placed against the government for one, allowing that occurrence to occur, combined with the occurrence of the New York Magazine.

> "I think the interviews are ill-timed, I think the story is ill-timed, I think the dissemination of information by the government until these some 91 or 81 cases have been completed is ill-timed, and I think that they can be sanctioned, and I think the Naphue Doctrine and various other doctrines as ennounciated by the United States Supreme Court and this Circuit are very, very applicable at this time, and based upon that, I ask for a dismissal. (T. 3085).

The government indicated that most of the article contained matters of public record "except, of course, some of the interviews that obviously took place with the detectives who were witnesses at the trial". (T. 3087). The Court finalized the discussion by indicating:

> "If it should be the occasion for the exercise of the Court's supervisory power, we will consider that at some appropriate time". (T. 3087).

It was finally conceded by the government that at least one of the individuals identified in the photograph, appearing at page 50 of the article was an individual who is depicted in another photograph at the trial of this case.

In an interesting twist, the government was to later indicate to the Court that defense counsels "are now bringing into the courtroom the individual centered in that article". (T. 3306-3307). The government appear per-

plexed that one Moe Lentini was to be called as a witness for the defendants, especially in view of the *New York Magazine* article. Some time thereafter, defense counsel decided not to call Mr. Lentini after thought and consideration. (T. 3458). It appears that the government's comments may have brought some thought to defense counsel in not calling the witness Lentini. (T. 3459).

On November 27, 1973, subsequent to the jury verdict, Judge Frankel issued a memorandum in which he directed government counsel to respond to certain questions with regard to the publicity surrounding this case.

> "Among the many subjects touched in pretrial hearings and left for further consideration at a later time was the matter of pretrial arrangements for publicity attending the mass of arrests on the morning of April 13-14, 1973. There remains questions as to whether these activities should be grounds for remedial action of any kind in the exercise of the Court's supervisory power over the business of law enforcement attending federal prosecutions". (Appendix C)

Judge Frankel further commented:

> "Without limiting the scope of such submissions, the Court recalls that they will place before us in pretrial hearings some photographs of people being arrested, including some evidently being "posed" for photographers. It may be that materials of this kind will be appropriate for this or some higher court in considering the fairness and propriety of the proceedings leading to the convictions herein". (*Id.*)

The government responded to the aforementioned

memorandum by directing a letter to the Trial Judge, dated December 12, 1973, and signed by an assistant who had alternatively tried the case and requested that this matter not be made an issue at this time:

> ". . . There is simply no need at this time for an inquiry to ascertain whether such publicity might have affected "the fairness and propriety of the proceedings leading to the convictions herein". (December 12, 1973 letter at p. 3 thereof.)

Immediately on that day Judge Frankel replied:

> "In any event, as you yourself recognize, the Court has a concern in its supervisory capacity with Rule 8 of our Criminal Rules. Moreover, it is not possible to say certainly that the fairness of the trial or any other procedural matters to which you refer will necessarily and absolutely preclude the defendants in this case from taking any advantage for themselves of possible violations respecting the prohibition against improper publicity. Cf. Mapp v. Ohio, 367 U.S. 643 (1961).

On December 17, 1973, the government responded. On January 8, 1973, Judge Frankel wrote the most complete "Memorandum on Pretrial Publicity". He detailed the facts concerning the publicity and commented upon the government's activities with regard to same.

> "The United States Attorney scarcely embraces the whole of the matter when he concludes in this case that this particular trial has not been demonstrated to have been vitiated by sorted publicity . . . but the atmosphere in our principles

are polluted if the indictment and arrest become the circuses they too often are, complete with prosecutors (press conferences and photographic spreads)." Id.

Nevertheless, counsel's final motions for a hearing, or alternatively for a setting aside of the conviction were denied by the Court. The court stated at sentence:

"I think its already been made clear that this Court does not view as trivial or insignificant the events surrounding the arrest that led to my memorandum.

I have written down some thoughts on this subject which I will try to get typed up and published in the next day or so for the guidance, I hope, of the people in law enforcement and perhaps the rest of us, that specifically on the motion, though I do not think it is frivilous, I concluded that it must be denied, and I do deny it . . .

I think it is, nevertheless, useful for us to have made this record. One of the reasons we have Appellate Courts is that we get the benefit of their detachment and their somewhat greater latitude in dealing creatively with the matter of supervising law enforcement, as well as supervising the lower courts, so all of the record will now be available for scrutiny on a higher level. At this level it does not serve to defeat these convictions or to warrant the dismissal of the indictment for which Mr. Slotnick and others have moved."

Immediately prior to sentencing the defendants, the Court indicated its great displeasure of what had occurred

with regard to the continuing publicity in this case.[17]

The Court of Appeals recounted the facts as stated above and, once again[18] warned the Government that "future" activities of this sort will not be countenanced.

THE TRIAL

The government's case against petitioners depended almost entirely on the testimony of the accomplice-witness, Joaquin Ramos, and the wiretapped admissions recorded at Diane's Bar, because, despite the certain prejudice from the improper admission of the heroin tracings against petitioners, DellaCava, and other improperly admitted testimonies and allegations, the government's case on the substantive counts depended on the *constructive* possession

17. As referred to in counsel's letters of December 24, 1973 after the defendants were convicted and released to go home for Thanksgiving, there appeared a frenzy of articles and radio and television comments with regard to the fact that the defendants had gone home, including interviews by law enforcement. There then was a further article reproduced in Readers Digest regarding the defendant John Capra. After all that had been done with regard to the publicity aspect of the case the Court continued:

> "I will simply say that I think it regrettable that the people in law enforcements, of whom I think there are many in this room, felt obliged to invite photographers to be with them while they valiantly guarded these defendants on Thanksgiving Day, that the risk was not commensurate with the dramatic performance staged by the members of law enforcement operations . . .". (Minutes of Sentence, 71).

As a result of the defendant's release to spend Thanksgiving with his family, the news media did not desist in their reporting of the event and carried it as a major piece of news.

Photographs of law enforcement officials guarding the home of the defendant DellaCava appeared and large articles recounted all the sordid events.

The Readers Digest Article referred to the wiretaping that was involved and it appeared that it was gained through interviews with law enforcement officials connected with this case—especially Detective George Eaton.

18. As it had in past cases—see specifically U.S. v. Pfingst, 477 F.2d 177 (2d Cir. 1973).

of the heroin in those counts by virtue of the conspiracy among the petitioners. There was no evidence of actual possession by any of the petitioners of any of the narcotics charged in the substantive counts. The importance of the wiretaps is conceded at p. 63 of the government's own brief in the Court of Appeals: "the overwhelming independent evidence of guilt introduced against Dellacava at trial, including extensive wiretap evidence and Ramos' direct testimony . . . " And,

> Together with the evidence obtained by visual surveillance accompanying the wiretaps, these conversations reveal how the conspiracy functioned and the central roles which Capra, Guarino and Dellacava played in the illicit scheme. (p. 17)

In his summation to the jury, the United States Attorney extensively reviewed in detail each of the tapped conversations and explained to the jury his interpretation of their meaning as showing a conspiracy among these men to sell and deliver heroin and hence each of their responsibilities for the acts of the others in the proof of the constructive possession on the substantive counts. (T 3875-3885)

> Now remember also that this count (2) as well as counts 3, 4 and 5, charge aiding and abetting, and I want you to listen particularly close to Judge Frankel's instructions on aiding and abetting, and also to his instructions concerning the responsibility of members of a conspiracy for the acts of other members committed in furtherance of that conspiracy. (T. 3845)

The Court itself carried on this theory of the case, i.e., that membership in a conspiracy which was responsible for possessing and delivering heroin made for proof of

possession on the part of the individual members, when it charged,

> Specifically, to speak in terms of what the Government contends and what you may find to have been proved or not proved, the contention is that the transportation of the 5½ kilos of heroin to Toledo, Ohio, as charged in the fourth count, was allegedly done pursuant to the direction or with the participation of Capra, Guarino, DellaCava and Jermain. If you find that kind of direction and control beyond a reasonable doubt, this would satisfy the requirement of possession within the meaning of the statute. (T.3926)
>
> The acts or deeds of A, even in the absence of B and C, may be taken as evidence against B and C, provided that those acts or deeds occur during the conspiracy and in furtherance of it. (T. 3942)
>
> He may be held liable for what has transpired before he joined and as well, what happens afterwards, while he remains a member (T. 3940)

Furthermore, during Detective Eaton's trial testimony when the wiretapped conversations were introduced into evidence the trial court refused the defense request that the jury be charged that these conversations be confined to evidence of the conspiracy only and against those defendants proved to be members. The Court refused such instructions throughout the trial. (T. 2239).

And that the jury verdict was ultimately influenced by this wiretap evidence, which the Court of Appeals has now held should not have been admitted for their consideration, is established by their own request during deliberations to have the transcripts of the conversations with them in the jury room. (T. 4018-4036).

Following are the taped conversations seized pursuant to the Diane's Bar taps and played to the jury.

TRANSCRIPT

DATE: December 11, 1971
TIME: 7:16 P.M.
Incoming call to STEPHEN DELLACAVA from VINO GREEN

DELLACAVA: Hello.
GREEN: How are you feeling?
DELLACAVA: Not so good pal.
GREEN: Well.
DELLACAVA: Not so good.
GREEN: Well.
DELLACAVA: Well I think we gotta wait til Monday.
GREEN: Alright.
DELLACAVA: Alright my buddy.
GREEN: Alright.
DELLACAVA: I'm sorry I can't help you.
GREEN: Well what are you gonna do?
DELLACAVA: Well what's there is there right.
GREEN: Alright.
DELLACAVA: Okay bud.

END OF CONVERSATION

TRANSCRIPT

DATE: December 11, 1971
TIME: 8:20 P.M.
Incoming call to DELLACAVA from VINO GREEN

DELLACAVA: Hello.
GREEN: How you feel?
DELLACAVA: Hah hah. Sick. Sick. Sick really.
GREEN: Me and you both.
DELLACAVA: My god, alright try and keep in touch with me, hah Pal.
GREEN: Bye.
DELLACAVA: Okay.

END OF CONVERSATION

TRANSCRIPT

DATE: December 21, 1971
TIME: 8:27 P.M.
Incoming call to STEPHEN DELLACAVA from JACK BROWN

DELLACAVA: Hello.
BROWN: Hi Buddy.
DELLACAVA: Hey Bud.
BROWN: How are you feeling?
DELLACAVA: Alright. How are you?
BROWN: A'r lousy I guess.
DELLACAVA: Me too, not so good.
BROWN: Ha Ha you are.
DELLACAVA: I was supposed to have a Christmas party, somebody died in the family and we ain't gonna have it.
BROWN: O my God, do you ain't gonna have it before Christmas.
DELLACAVA: No, I doubt that.
BROWN: Okay then Pops.
DELLACAVA: You know no sense lying.
BROWN: Yeah, well my cousin, he's
DELLACAVA: Yeah, he's sick, eh.

BROWN: Yeah he's sick too.
DELLACAVA: Yeah.
BROWN: Yeah, alright then well have a Happy one anyway.
DELLACAVA: You too. I gotta see you thursday anyway. I gotta bring you up a present anyway.
BROWN: Okay Pops.
DELLACAVA: So I'll be up there Thursday.
BROWN: Okay Pops.
DELLACAVA: Be home Thursday.
BROWN: I'll be here yeah.
DELLACAVA: Okay I'll be up there to see you.
BROWN: Okay Buddy
DELLACAVA: Okay.
BROWN: Alright bye, bye.
DELLACAVA: So long.

END OF CONVERSATION

TRANSCRIPT

DATE: December 23, 1971
TIME: 6:30 P.M.
Outgoing call made by STEPHEN DELLACAVA to JOHN CAPRA

MALE: Hello.
DELLACAVA: Hello, can you give me Johnny Hooks, or Leo next door, please.
MALE: Johnny Hooks?
DELLACAVA: Or Leo, either one.
MALE: Yeah, will you hold on?
DELLACAVA: Certainly will.
MALE: Okay.

(Long pause — background conversation)

CAPRA: Hello.
DELLACAVA: Hello, John
CAPRA: Yeah.
DELLACAVA: Beansie.
CAPRA: Yeah.
DELLACAVA: What's up? Anything?
CAPRA: No not really, no.
DELLACAVA: Do I have to bring anybody anything? You know like a present for their people?
CAPRA: Yeah.
DELLACAVA: You want me to pick it up, up there or what?
CAPRA: Yeah.
DELLACAVA: You're gonna stay a while.
CAPRA: Yeah.
DELLACAVA: Alright Bud, that's what I wanted to know.
CAPRA: Okay.
DELLACAVA: Okay.

TRANSCRIPT

DATE: December 27, 1971
TIME: 8:15 P.M.
Incoming call to STEPHEN DELLACAVA from VINO GREEN

DELLACAVA: Hello.
GREEN: How you feeling?
DELLACAVA: Alright, Buddy, how you been?
GREEN: Well I could do better, but ain't no use crying, Listen.
DELLACAVA: Yeah.

GREEN: My people didn't show down there, like they suppose to.
DELLACAVA: Yeah well.
GREEN: Any chance me seeing yew for myself so I could get those.
DELLACAVA: Well no, I don't think anythings going to happen anyway, you know.
GREEN: Inaudible.
DELLACAVA: The moving van, the moving van people don't have no point and time.
GREEN: A huh.
DELLACAVA: So I got to make another appointment with them.
GREEN: A huh.
DELLACAVA: Alright.
GREEN: Maybe they'll get in for me too tomorrow.
DELLACAVA: Yeah, probably, alright?
GREEN: Alright.
DELLACAVA: Okay.

END OF CONVERSATION

TRANSCRIPT

DATE: December 29, 1971
TIME: 10:30 P.M.
Incoming call to STEPHEN DELLACAVA from JACK BROWN

DELLACAVA: Hello
BROWN: Hey.
DELLACAVA: Hey buddy.
BROWN: How you feeling?
DELLACAVA: Alright how are you?
BROWN: I'm alright.

DELLACAVA: Where you home?
BROWN: I was.
DELLACAVA: Oh.
BROWN: I'm with some, some broads and things.
DELLACAVA: Oh.
BROWN: Yeah that's why.
DELLACAVA: Remember you told me one time, that you might give them fellows a Christmas present you know.
BROWN: Yeah, yeah.
DELLACAVA: Can you help them?
BROWN: Ah, do you want it tonight?
DELLACAVA: If you can.
BROWN: What time is it now?
DELLACAVA: Oh, its 25 to, 25 to 10, 10:30 it is.
BROWN: Alright, listen, a friend of mine is coming by, play a little cards, let me see what she is, and if she's alright, I'll do it for you.
DELLACAVA: Would you call me back?
BROWN: I definitely will.
DELLACAVA: Alright, I'll wait here for you.
BROWN: Hang out baby.
DELLACAVA: How long is it gonna be?
BROWN: Just give me a 1/2 an hour.
DELLACAVA: Okay baby.
BROWN: Alright?
DELLACAVA: Yeah.
BROWN: Okay.
DELLACAVA: Chow.
BROWN: Bye, bye.

END OF CONVERSATION

TRANSCRIPT

DATE: December 29, 1971
TIME: 6:50 P.M.
Incoming call to STEPHEN DELLACAVA from JACK BROWN

BROWN: Steve?
DELLACAVA: Yeah.
BROWN: Hey bud, how you feeling?
DELLACAVA: How are you buddy?
BROWN: Oh pretty good, how you feel?
DELLACAVA: Alright, not bad.
BROWN: That's good, you didn't call me Monday, did ya?
DELLACAVA: No, no, that would have been there.
BROWN: Oh yeah.
DELLACAVA: You know that.
BROWN: No, I was out of town you know.
DELLACAVA: Oh yeah, where were you?
BROWN: Inaudible.
DELLACAVA: How's the kid?
BROWN: He's fine you know.
DELLACAVA: Oh good.
BROWN: He's better now.
DELLACAVA: Good, Good, Good.
BROWN: So you'll be calling me soon.
DELLACAVA: Yeah I'd, yeah I'll call Friday alright?
BROWN: Okay.
DELLACAVA: You'll be home Friday?
BROWN: I certainly will.
DELLACAVA: Okay buddy.
BROWN: Okay buddy.
DELLACAVA: Okay, you take care.
BROWN: You do the same.
DELLACAVA: Okay.

BROWN: Hey, tell everybody I like my gifts.
DELLACAVA: Oh yeah.
BROWN: Yeah I really did.
DELLACAVA: Good, Good, Good.
BROWN: Talk to you later.
DELLACAVA: Okay buddy.
BROWN: Bye bye.
DELLACAVA: So long.

END OF CONVERSATION

TRANSCRIPT

DATE: December 29, 1971
TIME: 8:25 P.M.
Incoming call to STEPHEN DELLACAVA from JOHN CAPRA

DELLACAVA: Hello.
CAPRA: Hello.
DELLACAVA: Whose this?
CAPRA: Who do you think it is?
DELLACAVA: Heh my best buddy.
CAPRA: Did you go see a, what his name? Our friend.
DELLACAVA: Yeah, yesterday.
CAPRA: He didn't have no Christmas present?
DELLACAVA: Nah.
CAPRA: Didn't you say he had a present for us? Didn't you tell me that?
DELLACAVA: I said that to you?
CAPRA: Yeah.
DELLACAVA: The one that I
CAPRA: Yeah you know, to the old guy, didn't you tell.
DELLACAVA: Oh, yeah, yeah, yeah, yeah, yeah, yea, yea.
CAPRA: Huh?

DELLACAVA: Yeah but I gotta go back there.
CAPRA: ***happens, alright?
DELLACAVA: I'll give him a call.
CAPRA: Alright I'll be up here.
DELLACAVA: Alright.
CAPRA: Okay.
DELLACAVA: I'll ask for you over there.
CAPRA: Yeah.
DELLACAVA: Okay.
CAPRA: Bye, bye.
DELLACAVA: So long.

END OF CONVERSATION

TRANSCRIPT

DATE: January 7, 1972
TIME: 6:01 P.M.
Incoming call to STEPHEN DELLACAVA from VINO GREEN

DELLACAVA: Hello
GREEN: How you feeling?
DELLACAVA: I'm feeling fine.
GREEN: Yeah that's good, it growed.
DELLACAVA: Huh?
GREEN: Not much, bit it growed.
DELLACAVA: Well that's alright.
GREEN: Alright.
DELLACAVA: Okay.
GREEN: See you later?
DELLACAVA: Yeah.
GREEN: Bye.
DELLACAVA: Make that about 9:30, Alright?
GREEN: Alright.

DELLACAVA: Okay.
GREEN: Alright.
DELLACAVA: So long.

END OF CONVERSATION

TRANSCRIPT

DATE: January 10, 1972
TIME: 7:25 P.M.
Incoming call to STEPHEN DELLACAVA from JACK BROWN

DELLACAVA: Hello.
BROWN: Yeah, what do you say bud?
DELLACAVA: Hey, how are you?
BROWN: Alright. Wre you gonna call me tonight?
DELLACAVA: Yeah, well, a little later. A little too early for you right?
BROWN: Yeah, that's okay.
DELLACAVA: You say 8-9 you know.
BROWN: You gonna play chess.
DELLACAVA: Yeah its up to you.
BROWN: Yeah, I'll play some.
DELLACAVA: Ah, want me to bring the big fellow over.
BROWN: Yeah, bring a hogie sandwich.
DELLACAVA: Yeah, okay.
BROWN: Okay.
DELLACAVA: Alright figure about 11, alright.
BROWN: I'll be here.
DELLACAVA: Okay buddy.
BROWN: Case I fall asleep, just wake me.
DELLACAVA: I will.
BROWN: Okay.

DELLACAVA: Okay.
BROWN: See, she's going out tonight.
DELLACAVA: Alright I'll wake you.
OUT: Okay.
DELLACAVA: I'll bring my friend, we'll play chess.
BROWN: Alright.
DELLACAVA: Okay.
BROWN: Bye, bye.
DELLACAVA: Chow.

END OF CONVERSATION

TRANSCRIPT

DATE: Jajuary 14, 1972
TIME: 6:48 P.M.
Incoming call to STEPHEN DELLACAVA from JOHN CAPRA

DELLACAVA: Hello.
CAPRA: Hello.
DELLACAVA: How are you?
CAPRA: Alrighty.
DELLACAVA: Yeah, I got an appointment about 9 o'clock. How about you, where you gonna be?
CAPRA: No place.
DELLACAVA: You ain't, you gonna stay home.
CAPRA: No, I'm up here.
DELLACAVA: Oh alright.
CAPRA: But I don't want you to come here.
DELLACAVA: Yeah, I know, yeah.
CAPRA: Who you got an appointment with, the right guy?
DELLACAVA: Yeah.
CAPRA: The guy you supposed to see?
DELLACAVA: He's gonna call me an hour, aba, a couple

of hours from now, then I gotta meet him.
CAPRA: Oh, then I'll see you after that.
DELLACAVA: Where?
CAPRA: Where you gonna go? Back to the bar?
DELLACAVA: Yeah. I'll back in a, I'll be here, let's see, about 10:30, I should be here.
CAPRA: Alright.
DELLACAVA: Alright.
CAPRA: Yeah.
DELLACAVA: Okay.
CAPRA: Bye bye.
DELLACAVA: So long.

TRANSCRIPT

DATE: January 18, 1972
TIME: 6:12 P.M.
Incoming call to STEPHEN DELLACAVA from JOHN CAPRA

DELLACAVA: Hello.
CAPRA: I'll meet you there 8:00 o'clock, same place.
DELLACAVA: Alright.
CAPRA: Alright.
DELLACAVA: I got to meet him first, right?
CAPRA: No, go straight there, bring the money with you, and you know, we'll split it later.
DELLACAVA: Alright.
CAPRA: How much money?
DELLACAVA: Alright, where we were last night.
CAPRA: Ah?
DELLACARA: Where we were last night.
CAPRA: I'll meet you there a little later maybe or the same time.
DELLACAVA: Alright.

CAPRA: Alright.
DELLACAVA: Yeah.
CAPRA: Okay Chubby.
DELLACAVA: Yeah Chubby.
CAPRA: That other guy yet?
DELLACAVA: No. Nobody.
CAPRA: Hah.
DELLACAVA: Nobody.
CAPRA: Hah.
DELLACAVA: Nobody.
CAPRA: Well give him a call huh?
DELLACAVA: Yeah I will a little later.
CAPRA: Alright. Bye, bye.
DELLACAVA: Okay, so long.

TRANSCRIPT

DATE: January 20, 1972
TIME: 6:56 P.M.
Incoming call to STEPHEN DELLACAVA from JOHN CAPRA

DELLACAVA: Hello.
CAPRA: Hello.
DELLACAVA: How are you Bud?
CAPRA: Alright what?
DELLACAVA: I said how are you, that's all I said.
CAPRA: Oh, I thought you says alright.
DELLACAVA: Alright, nothing yet.
CAPRA: No call.
DELLACAVA: Nah, he's supposed to call me 9-9:30.
CAPRA: I'll be up here.
DELLACAVA: Oh you staying up there?
CAPRA: Yeah, I'll stay here and wait for your call.
DELLACAVA: My call, how my gonna call you there?

CAPRA: Well come up here then.
DELLACAVA: I'll come up about 11, if nothing happens alright?
CAPRA: Alright.
DELLACAVA: Okay.
CAPRA: And eh, if it happens, make it, appointment early.
DELLACAVA: Yeah.
CAPRA: Alright, I wanna go see him with you.
DELLACAVA: Right.
CAPRA: Alright.
DELLACAVA: Okay.
CAPRA: Bye, bye.
DELLACAVA: So long.

END OF CONVERSATION

TRANSCRIPT

DATE: January 21, 1972
TIME: 4:58 P.M.
Incoming call to STEPHEN DELLACAVA from JOHN CAPRA

DELLACAVA: Hello.
CAPRA: Hello.
DELLACAVA: How are you?
CAPRA: Alright.
DELLACAVA: You sound alright.
CAPRA: What happened?
DELLACAVA: Not much, he be in either today or tomorrow night for sure what am I gonna say to you, the other guys coming tonight so I'll have to wait for him.
CAPRA: You spoke to this guy?
DELLACAVA: Yeah, I spoke to him, hollered at him, says

he's got it, he's just waiting on something, I don't know.
CAPRA: Alright.
DELLACAVA: You know what I mean?
CAPRA: Okay.
DELLACAVA: What are ya, where you at?
CAPRA: I gonna be up there for a while.
DELLACAVA: You gonna stay there?
CAPRA: Yeah, what time you gonna wait till?
DELLACAVA: I'll wait for this guy until about 10.
CAPRA: Alright, and I'll be up, I'll see you after that then.
DELLACAVA: Yeah.
CAPRA: About 11.
DELLACAVA: Something like that.
CAPRA: 10:30 alright.
DELLACAVA: Yeah, you'll be up there right?
CAPRA: Right.
DELLACAVA: Okay.
CAPRA: Bye, bye.
DELLACAVA: So long.

END OF CONVERSATION

TRANSCRIPT

DATE: January 27, 1972
TIME: 6:48 P.M.
Outgoing call to JOHN CAPRA from STEPHEN DELLACAVA

FEMALE: Hello.
DELLACAVA: Hello! Could I talk to John please?
FEMALE: Who is it?
DELLACAVA: Aa, Steve.
CAPRA: Hello.
DELLACAVA: Hello buddy.

CAPRA: Yeah.
DELLACAVA: You called here? Right?
CAPRA: Huh?
DELLACAVA: You called before?
CAPRA: Yeah.
DELLACAVA: Yeah, I called him this morning and he explained something to mek you know, he, according to him, ah, I gotta give you an explanation. I, I yelled at him and told him what the story was, after all we were behind.
CAPRA: Yeah.
DELLACAVA: These people don't wanna know nothing, they, they want a job they don't wanna know nothing, so he says "Alright, look Steve, I'll call you tonight late, if not tomorrow I'll be in definitely" he says, "Don't worry about it, everything is intact if there is not your worried about, I says that isn't the point, we're getting, we being pressed," You know what your saying Iam saying it to him, you know.
CAPRA: Right.
DELLACAVA: I said "These people are on our backs, after all it ain't a dime, a car costs a lot of money, you know.
DELLACAVA: So that's what it amounted too, that are you gonna do tonight.
CAPRA: Nothing.
DELLACAVA: You gonna be home.
CAPRA: Yeah.
DELLACAVA: Alright, I'll call you later tonight if I hear from him.
CAPRA: I'll go to the show.
DELLACAVA: Alright, what time you be home from the show?
CAPRA: Ah, 11:30.
DELLACAVA: I'll call you about 12, or you call me when you come back its easier.

CAPRA: Right.
DELLACAVA: Alright.
CAPRA: Yeah.
DELLACAVA: Alright.
CAPRA: Bye, bye.
DELLACAVA: So long.

END OF CONVERSATION

TRANSCRIPT

DATE: February 2, 1972
TIME: 9:05 P.M.
Incoming call to STEPHEN DELLACAVA from JACK BROWN

DELLACAVA: Hello.
BROWN: Hey Pops how you feeling?
DELLACAVA: Hey hos are you?
BROWN: Oh so so.
DELLACAVA: Oh good, I'm glad to hear from you.
BROWN: Yeh, I ain't been nowhere just
DELLACAVA: Hanging around?
BROWN: I had trouble man you know my son, my big boy. got in a world of trouble, man, he got busted for robbery.
DELLACAVA: Oh God.
BROWN: Boy I'm telling.
DELLACAVA: You needed that huh.
BROWN: Ain't that a bitch.
DELLACAVA: Son of a gun.
BROWN: Inaudible—cocksucker, listen ah, ah, I don't know, I might want to play a little game of chess with you tomorrow, you know.
DELLACAVA: Alright I'll give you a call about 8, alright?
BROWN: Alright yeah if a you know if a, bring my little

friend with you if you come okay?
DELLACAVA: Okay.
BROWN: Alright.
DELLACAVA: I'll come anyway or I'll call you first.
BROWN: You can come later on if you want to, you know.
DELLACAVA: Tonight?
BROWN: Yeah if you want to, you know.
DELLACAVA: Naw, I'll come tomorrow.
BROWN: Okay Pops.
DELLACAVA: About 8 alright.
BROWN: Alright.
DELLACAVA: Okay.
BROWN: Okay. What you do call me first.
DELLACAVA: Alright, I'll do that.
BROWN: And I'll have some hor d'oeurvres and things okay.
DELLACAVA: Okay buddy.
BROWN: How the family.
DELLACAVA: Everybody's fine. How the wife?
BROWN: She alright, she holding up real nice.
DELLACAVA: Ah good good.
BROWN: Okay I'll talk to you.
DELLACAVA: Okay.
BROWN: Okay bye.
DELLACAVA: Bye.

END OF CONVERSATION

TRANSCRIPT

DATE: February 3, 1972
TIME: 8:40 P.M.
Incoming to STEPHEN DELLACAVA from LEOLUCA GUARINO

DELLACAVA: Hello.
GUARINO: Hello how are you?
DELLACAVA: I'm fine how are you.
GUARINO: Pretty good, how's everything.
DELLACAVA: Alright, where you at home.
GUARINO: No I gotta go out.
DELLACAVA: Oh.
GUARINO: I'm going out now, as a matter of fact, a little while.
DELLACAVA: Huh huh.
GUARINO: Did you see our friend.
DELLACAVA: Which one.
GUARINO: Jack.
DELLACAVA: He called, he's in someplace else, but I don't know the God damn number there.
GUARINO: Yeah.
DELLACAVA: Yeah.
GUARINO: Oh wait a minute I got some numbers on me.
DELLACAVA: You know the one where he went to the baptism.
GUARINO: Ah, I don't know which is which, I got all the numbers on me.
DELLACAVA: Well right, you could read a couple of, I'll know it if I hear it.
GUARINO: Alright hold on one.
DELLACAVA: Wait, I think one's with a 874, see if you find that one.
GUARINO. Yeah hold on a second.
DELLACAVA: I'm holding.
GUARINO: What are you a wiseguy.
DELLACAVA: Nah.
GUARINO: Inaudible.
DELLACAVA: What'd you have another slug of cough syrup.
GUARINO: Inaudible.

DELLACAVA: No.
GUARINO: Inaudible.
DELLACAVA: Nah, not that one.
GUARINO: Inaudible - 59.
DELLACAVA: Yeah there's the one.
GUARINO: Inaudible — 575.
DELLACAVA: Wait on, hold on let me get a pencil, okay go ahead 873
GUARINO: 873-4575.
DELLACAVA: 4575 yeah.
GUARINO: Inaudible.
DELLACAVA: You want my, your friend to give you n
GUARINO: Yeah.
DELLACAVA: Oh I figured that out, you think you got a tell me.
GUARINO: What time you gonna be back?
DELLACAVA: Now I'm gonna call him, if he's there, I'll make an appointment, then it'll be after that, why don't you call me back in about, what time is it now?
GUARINO: It's a, I got ten to 9.
DELLACAVA: Ten to 9, call me back in 15 minutes, I'll let you know.
GUARINO: Alright.
DELLACAVA: Okay.

END OF CONVERSATION

TRANSCRIPT

DATE: February 3, 1972
TIME: 8:49 P.M.
Outgoing call to MRS. BROWN from STEPHEN DELLACAVA

MRS. BROWN: Hello.

DELLACAVA: Hello dear.
MRS. BROWN: Hello — Listen ah he said that he would meet you back there.
DELLACAVA: Oh.
MRS. BROWN: Cause he had waited and waited, ah.
DELLACAVA: Yeah but I didn't know the damn number.
MRS. BROWN: Right ah the telephone is not in working order.
DELLACAVA: Oh over there.
MRS. BROWN: Yeah.
DELLACAVA: Over there.
MRS. BROWN: He'll be there.
DELLACAVA: Oh he'll be there?
MRS. BROWN: Right.
DELLACAVA: Okay doll.
MRS. BROWN: Ah you will be there?
DELLACAVA: Yeah I'm gonna take off now.
MRS. BROWN: Okay.
DELLACAVA: Okay. So long.

END OF CONVERSATION

TRANSCRIPT

DATE: February 3, 1972
TIME: 9:05 P.M.
Incoming call to STEPHEN DELLACAVA from LEOLUCA GUARINO

DELLACAVA: Hello.
GUARINO: Yeah.
DELLACAVA: Figure about an hour, where you gonna be.
GUARINO: I'm be down a Rainbow Grill.
DELLACAVA: Ahhh how am I gonna get to you there.
GUARINO: About an hour.

DELLACAVA: Yeah. I'll be a, I'll be west. there ain't no place on the East side over there you can?
GUARINO: Where's the Rainbow Grill.
DELLACAVA: It's gotta be on Grill?
GUARINO: Yeah.
DELLACAVA: Isn't that Radio City? No not Radio City.
GUARINO: Rockefeller Center.
DELLACAVA: RCA building ain't it?
GUARINO: Yeah, what street is that?
DELLACAVA: 50 something. I don't know. 53rd I think it is.
GUARINO: 53rd Where the hell am I gonna meet you? Let me see.
DELLACAVA: When will you be leaving, where you at?
GUARINO: I'm gonna have dinner there.
DELLACAVA: When are you gonna leave, where you at now?
GUARINO: Now right now.
DELLACAVA: Oh I see.
GUARINO: Um.
DELLACAVA: You travelling by car.
GUARINO: Yeah.
DELLACAVA: What time is the show over there?
GUARINO: Well it's every hour.
DELLACAVA: Oh I see, so it doesn't matter, what time uh?
GUARINO: No tell him I'll be there 10:30.
DELLACAVA: What 10:30.
GUARINO: It's 5 after 9 now.
DELLACAVA: That's just about right, right?
GUARINO: Yeah.
DELLACAVA: Uh how about meeting me on a, a, what's that avenue now? 5th Avenue, right in front of where the statue is, you know where the statue is in Rockefeller Center.

GUARINO: Yeah.
DELLACAVA: Meet me right there.
GUARINO: What time?
DELLACAVA: Well 10 to 10:30.
GUARINO: Okay.
DELLACAVA: Quarter after 10. so it gives you time.
GUARINO: Alright good.
DELLACAVA: Alright?
GUARINO: Yeah.
DELLACAVA: Okay you know where.
GUARINO: Yeah.
DELLACAVA: Okay.
GUARINO: Alright hey.
DELLACAVA: What?
GUARINO: How about 5th Avenue.
DELLACAVA: Right on.
GUARINO: There's a statue there.
DELLACAVA: Yeah in front of Rockefeller Center.
GUARINO: Okay.
DELLACAVA: Okay.
GUARINO: So long.
DELLACAVA: So long.

END OF CONVERSATION

In its final charge to the jury. the Court improperly charged a preponderance test for determining membership in the conspiracy. and objection to this charge was overruled (T. 3942. 3968). Objection was also taken to the all or nothing single conspiracy charge (T. 3974).

The jury returned a verdict of guilty on all counts for each defendant so charged. (T. 4100)

REASONS FOR GRANTING THE WRIT

The writ should issue because: (1) Illegally wiretapped conversations of narcotics dealings by and among petitioners were introduced into evidence as admissions without instructions to the jury as to which counts this evidence should be applied, and these conversations comprised the only evidence corroborating petitioners' narcotics dealings, and proof of constructive possession in the substantive counts for which they were convicted and which was based on the tainted evidence of conspiracy; accordingly, the Fourth and Fifth Amendments and 18 U.S.C. Sections 2510 et. seq. require reversal of the convictions thus obtained on the substantive counts; (2) the Fourth Amendment exclusionary rule and the Fifth Amendment right to due process, fair hearing and trial require that where there is uncontradicted evidence that the identity of the chief government witness, his connection to defendants, and their mutual association in a joint criminal venture were discovered by illegal wiretapping, the judgment of conviction should be reversed, or, in the alternative, a hearing held to determine the facts; (3) the Fourth Amendment exclusionary rule requires that where there is uncontradicted evidence that the identities of the petitioners and their connection to narcotic crimes and their mutual association in a joint criminal venture were discovered by illegal wiretapping, the indictment which grew out of the investigation begun by the illegal wiretapping should be dismissed; (4) no warrant was obtained for the delayed vacuum search and destruction of a gym bag seized five days earlier from petitioner Dellacava's automobile; and no warrant had been obtained for the earlier search and seizure of the car, and no probable cause existed for either search—thereby requiring that the evidence thus obtained be suppressed;

(5) the actions by law enforcement officers which resulted in massive and lurid publicity present such a grave danger that undue publicity will convict an accused in the minds of the general public and so seriously prejudice a defendant's rights to be accorded a fair trial by an impartial jury according to due process, that this Court should exercise its supervisory powers and dismiss the indictment as a prophylactic rule without the necessity of showing specific prejudice in the particular case; (6) the petitioners' ownership of a suitcase checked at a railroad baggage terminal carried with it a reasonable expectation of privacy and the search of that suitcase conducted by a railroad policeman was a governmental search to which they had standing to object and, thus, the evidence seized as a result thereof should have been suppressed; (7) the court's failure to give limiting instructions throughout the trial upon receipt of evidence of hearsay conversations and acts in furtherance of separate conspiracies, and the court's general and contradictory final charge on this subject, and the government's prejudicial evidence of uncharged crimes and separate conspiracies, deprived petitioners of their Fifth and Sixth Amendment rights to a fair trial; and (8) petitioners were deprived of a fair trial by the government examination of witnesses which elicited irrelevant and highly prejudicial testimony about non-probative and previously excluded matter and by the use of evidence of minute dust tracings consumed in government analysis.

I

During a trial on an indictment charging petitioners with four substantive narcotics transactions encompassed within the operation of a single narcotics conspiracy, the overall conspiracy conviction was tainted by the introduction into evidence of narcotics conversations wiretapped without

court authorization. The substantive charges of possession must also fall, since their proof depended on each of the petitioner's constructive possession, proof of which was established by his membership in the conspiracy. Since this theory of constructive-possession-by-virtue-of-the-common-scheme or plan was emphasized to the jury by the prosecutor in his summation and by the judge in his charge, and since there was no evidence before the jury of actual possession by the petitioners of the narcotics involved in the substantive charges, these illegally seized conversations, characterized by the government as actual narcotics transactions, tainted the convictions on all the counts charged.

Ramos, the chief government witness, named as an unindicted conspirator, gave testimony in chronological order about his associations and narcotics dealings, without divisions into counts and charges, and according to that testimony, only his partner Jermain made the actual deliveries of the heroin involved in the substantive counts.[19] He testified that these three transactions, August and November, 1970, and October, 1971, were only instances in a large narcotics business stretching from 1969 through the indictment date in 1973, and that throughout that period, he never saw petitioners touch, handle, or possess heroin. As to the transactions in the substantive counts, Ramos testified that petitioners participated in discussions of prices and customers and methods of delivery and received money from him, but that it was Jermain who always had the narcotics or who always told Ramos that a particular deal had been completed.

19. Ramos was convicted in Ohio of making the actual delivery of the heroin to Toledo, although he denied it at his trial but without being able to say who made the actual delivery.

The evidence presented by the government as to counts 2, 3, 4 and 5 rely only on the testimony of Ramos and Simms which testimony was uncorroborated as to the petitioners. That evidence as the government described it in its brief, was as follows. As to count 2, the government contended at page 8 of its brief in the Court of Appeals:

> "as they left the motel room, Jermain told Ramos that the money for the kilogram of heroin was in the trunk and that he would take care of the delivery of the narcotics."

The government's evidence as to count 2 finally was that Jermain gave Harris and Simms two packages containing the kilogram of heroin. Nowhere in the testimony is there direct knowledge of Ramos that Jermain received the heroin from Capra, Guarino or Dellacava. As to count 3, the government cited in its brief at page 10 the trial transcripts, pages 281-286, which transcript reveals the testimony of Ramos as follows:

> "Q. Several days later, did Bobby Jermain come to your house?"
>
> A. Yes, he did.
>
> Q. What took place at that time?
>
> A. He told me, 'We have to go to the airport,' he says, 'I gotta call and they'll be coming in by plane.' I asked him where were the goods at. He told me the trunk of the car.
>
> Q. Did you go to the airport?
>
> A. Yes, we left my house and then we went to the airport.
>
> Q. Mr. Ramos, tell the Court and jury what took place at the airport when you arrived?
>
> A. Well, we were waiting by the gift shop, Bobby and myself. Bobby had an attache case, and then Morris and another guy came. We didn't know

who the other guy was at the time.

Q. What was in the attache case that Bobby Jermain had?

A. We had the two kilos of heroin.

Q. What took place?

A. So Bobby waited by the gift shop and I waited maybe about — I stood away from him about five yards, and then Morris and this other guy came and, this other guy with the suitcase came over by the gift shop, put his suitcase down, Bobby, put his down, and then the other guy picked up Bobby's suitcase and Bobby picked up the suitcase with the money. I looked at Morris, he looked at me, then he turned around, he turned around, and left.

Again, the testimony of Ramos leaves a void in the evidence as to where and from whom Jermain received the heroin. With regard to counts 4 and 5 (the "Toledo" counts), the government contended at page 14 of its brief that "Ramos was informed by Jermain at Diane's Bar that the suitcase had been delivered by a courier to Toledo." Significantly, Ramos claimed again that he never saw the heroin and was only informed of its passage by Jermain. No direct connection in Ramos' testimony is established to Capra, Guarino and Dellacava.

Thus, in the absence of evidence of actual possession by any of the petitioners of the narcotics charged in the substantive counts, their individual guilts because of their constructive possession of those narcotics, or of aiding and abetting in the substantive possessions, depended on proof that they were members of a conspiracy which was responsible for the deliveries and, hence, as members of that conspiracy, responsible for the substantive possessions. The United States Attorney so "charged" the jury:

"Now remember also that this count (2) as well as counts 3, 4 and 5, charge aiding and abetting, and I want you to listen particularly close to Judge Frankel's instructions on aiding and abetting, and also to his instructions concerning the responsibility of members of a conspiracy for the acts of other members committed in furtherance of that conspiracy." (T. 3845)

And, the trial judge complied by giving standard legal charges which in sum would lead a jury to use their tainted determination of guilt on the conspiracy to establish guilt of the substantive offenses:

"Specifically, to speak in terms of what the Government contends and what you may find to have been proved or not proved, the contention is that the transportation of the 5-1/2 kilos of heroin to Toledo, Ohio, as charged in the fourth count was allegedly done pursuant to the direction or with the participation of Capra, Guarino, Dellacava and Jermain. If you find that kind of direction and control beyond a reasonable doubt, this would satisfy the requirement of possession within the meaning of the statute." (T. 3926).

"I have told you in a fairly standard legal conception that in a sense, one conspirator, one member of a conspiracy, is aid to be the agent of every other member. One of the things that follows from this is that if a jury finds from a preponderance of the independent evidence as to each individual alleged member that people I shall call for the moment A, B and C are all members of a conspiracy, then the acts or deeds of A, even in the absence of B and C, may be taken as evidence against B and C, provided that those acts or deeds

> occur during the conspiracy and in furtherance of it." (T. 3942)··He may be held liable for what has transpired before he joined and as well what happens afterwards, while he remains a member." (T. 3940)

The trial evidence, the theory of the government and the charge to the jury so interrelated the conspiracy and substantive charges that, "together with the evidence obtained by visual surveillance accompanying the wiretap, these conversations reveal how the conspiracy functioned and the central roles which Capra, Guarino and Dellacava played in the illicit shceme." (Government's brief in the Second Circuit at p. 17) must have tainted the substantive convictions. The Second Circuit inexplicably and erroneously affirmed those convictions in light of its own finding that

> "(t)o corroborate Ramos' testimony that this was an on-going conspiracy involving all of the defendants, the Government offered several transcripts and recordings of wiretaps involving Dellacava, Guarino and Capra, and the testimony of the officers who conducted surveillance of the defendants on the basis of leads provided by the wiretapping." (Appendix A)

The Court of Appeals has apparently overlooked its own and other decisions in multi-count narcotics conspiracy cases where the interrelationship of the conspiracy and substantive charges and the inevitable prejudicial influence of evidence across counts required reversal of all convictions when one is tainted or improperly submitted to the jury. *United States v. Cantone*, 426 F.2d 902, 905 (2nd Cir., 1970) cert. den. 400 U.S. 827; *United States v. Vaught*, 485 F.2d 320 (4th Cir., 1973); *United States v.*

Stevenson, 409 F.2d 354 (7th Cir., 1969). See also *Nardone v. United States*, 302 U.S. 379 (1937), 90 F.2d 630 (2nd Cir., 1937) (illegally seized wiretap evidence requires reversal of conspiracy and substantive counts where conspiracy is used to prove substantive counts and where evidence of conspiracy is otherwise circumstantial).

> "(A) defendant in a trial in which the conspiracy count has been dismissed is likely to be prejudiced in defending the charges in the substantive counts by evidence — particularly hearsay testimony, which was admissable on the conspiracy count but which could not have been used against him in a separate trial on the substantive counts." (*United States v. Branker, supra* at 888.)

Furthermore, the jury in this case was never instructed to confine the wiretap evidence and resultant police surveillance testimony about money seized from petitioner Dellacava's vehicle after his arrest in February, 1972 pursuant to leads gained as a result of the illegal wiretaps, to their consideration of the conspiracy charge alone. The evidence was received without any limiting instructions, over defense objection. It is, therefore, difficult to understand the Second Circuit's rather glib conclusion concerning the operation of the collective mind of the jury, a conclusion which the Court could not possibly reach beyond a reasonable doubt (*Chapman v. California*, 386 U.S. 18 (1967), "that none of the evidence resulting from the illegal wiretaps was used to prove the guilt of any of the defendants, Capra, Guarino, Dellacava and Jermain, on the substantive charges, Counts 2, 3, 4 and 5." These recorded conversations as they were characterized by the United States Attorney in his summation (T. 3875-3885), were recordings of admissions and confessions of the petitioners in the midst of actual narcotics transactions.

Playing the tapes to the jury was analogous to showing the jury a film of petitioners in the act of committing all the offenses charged in the indictment. The Government regarded this evidence as crucial to its entire case "the overwhelming independent evidence of guilt introduced against Dellacava at trial, including extensive wiretap evidence and Ramos' direct testimony . . ." (Government Brief in the Second Circuit at p. 63). The prosecutor spent 10 pages of his summation explaining the conversations and the jury finally requested to have the transcripts with them during their deliberations. (T. 4018). Certainly, under these circumstances, at the very least it must be said, "there is a reasonable possibility that the evidence complained of might have contributed to the conviction". *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963). And, as where improperly obtained statements and confessions are introduced into evidence at a criminal trial, "the existence of independent corroborative evidence produced at trial is, of course, irrelevant to our decisions." *Miranda v. Arizona*, 384 U.S. 436, 482 n. 52 (1966); *Haynes v. Washington*, 373 U.S. 503 (1963); *Rogers v. Richmond*, 365 U.S. 534 (1961).

This Court has said in *Wong Sun v. United States*, 371 U.S. 471, 493 (1963):

> "But because he might, as the factfinder, have found insufficient corroboration from the narcotics alone, we cannot be sure that the scales were not tipped in favor of conviction by reliance upon the inadmissible Toy statement. This is particularly important because of the narcotics nature of the offense involved here."

There is no way for any court to be certain that confessions improperly before the jury were not relied on by the jury to convict, even where there is some other corroborative

evidence in the case. And, in this case, as in *Wong Sun*, there is every indication that the jury did rely on the conversations which were the only corroboration of that part of Ramos' testimony relating to the dealings of petitioners. *Jackson v. Denno*, 378 U.S. 368 (1964); *Bruton v. United States*, 391 U.S. 123 (1968). In his testimony, Ramos described his role in the conspiracy and that of his partner Jermain as middlemen between the sellers, petitioners, and the Detroit buyers, Harris and Morris. Putting aside the wiretaps, the other corroborative evidence supported the testimony only as to his and Jermain's activities with the Detroit buyers, and that evidence consisted only of evidence of bare comings and goings, i.e., police surveillance testimony of days and times and places when Ramos and Jermain were seen to meet with Harris and Simms in 1970 (see testimony of Agents Johnson, Kostecke, Canavan, Jackson, Harper and Campbell), testimony of Simms as to his activities as a courier between the Detroit people and Ramos, testimony of Sassone as to his activities as a courier for Ramos, and some telephone toll records and airplane tickets to show that Ramos and others were at a place testified to by Ramos. Thus, the so-called independent corroboration relied on by the Second Circuit, was corroboration of events innocuous in themselves or of events having to do with the other end of the alleged conspiracy with which petitioners concededly had no contact.

The wiretaps, on the other hand, were of a different order. They were evidence of actual illegal activities on the part of petitioners and, as such, they were devastating to the defense case attacking Ramos' credibility *on the issues of petitioners' criminal participation*. And, because they were independent evidence of criminal conduct, not simply evidence that a phone call had been made or a trip to

Miami taken, they were more than mere corroborative evidence; they were evidence of other crimes which the jury was permitted to apply to the determination of guilt on the substantive charges, and which it is reasonable to believe they did so apply. Furthermore, since these conversations allegedly involved specific references to the handling of narcotics by petitioners, they were the real corroborative evidence of Ramos' testimony concerning petitioners' roles as suppliers, and the only evidence in the case of actual handling of narcotics by petitioners. Thus, where illegally seized evidence is corroborative of accomplice testimony it "cannot be said to be harmless under applicable standards (*Chapman v. California*, 386 U.S. 18 (1967); *Harrington v. California*, 395 U.S. 250 (1959)." *Whitely v. Warden*, 401 U.S. 560 (1971); *Stoner v. California*, 376 U.S. 483, 490 n. 8 (1964); *United States v. Wright*, 489 F.2d 1181 (D.C. Cir., 1973); *Holloway v. Wolff*, 482 F.2d 110 (8th Cir., 1973); *United States v. Scheffer*, 463 F.2d 567 (5th Cir., 1972).

Petitioners' convictions, therefore,

> "depended in large part upon the jury's resolution of the question of the credibility of witnesses, and that determination must almost certainly have been influenced by the incriminating nature of the physical evidence illegally seized and erroneously admitted. There is thus at least 'a reasonable possibility that the evidence complained of might have contributed to the conviction.' *Fahy v. Connecticut*, 375 U.S. 85, 86, 84 S.Ct. 229, 230, 11 L.Ed. 2d 171." *Stoner v. California, supra.*
>
> "Although in a sense the confession in both cases 'merely corroborated what the Government already had established,' 352 U.S. at 242, 77 S.Ct. at 300,

> the similarity is more formal than real. Whereas the admission in *Delli Paoli* was hardly critical to a case already made out by testimony of outside observers, Jones' confession furnished devastating corroboration of the heavily attacked testimony of an accomplice on which the prosecution almost entirely depended for proof of guilty. This admission by a defendant that Kuhle had worked with him and all the others probably ended whatever chance any of them might have had to find a juror unconvinced of his guilt beyond a reasonable doubt. Indeed, even if the jury could perform the feat of not speculating over the inserted blanks, Jones' confession of his own association with Kuhle would have a serious spillover effect at least on Mulhearn and Pizzo." *United States v. Bozza*, 365 F.2d 206, 216 (2nd Cir., 1966).

As we have shown, then, the convictions on all counts in this case were founded substantially on evidence illegally seized in violation of the Fourth Amendment, and the added statutory protections of 18 U.S.C. Section 2510 *et. seq.* "which represented a congressional effort to afford special safeguards against the unique problems posed by misuse of wiretapping and electronic surveillance." These statutory safeguards demand an even wider application [20] of the exclusionary rule than with respect to evidence illegally seized by ordinary physical search. *United States v. Calandra*, 94 S.Ct. 613, 623 (1974); *Gelbard v. United States*, 408 U.S. 41, 69-70 (1972). "But it is not deterrence alone that warrants the exclusion of evidence illegally

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20. Especially, since the Court of Appeals found these devastating wiretaps to be illegal.

obtained — it is 'the imperative of judicial integrity'. *Elkins v. United States*, 364 U.S. 206, at 222." *Harrison v. United States*, 392 U.S. 219, 224, n. 10; *McNabb v. United States*, 318 U.S. 332 (1942).

Finally, at the very least, the Circuit's reversal of the conspiracy should result in a remand for reconsideration of sentencing on the remaining counts.

> Since Del Busto and Garcia received concurrent sentences on the two counts and since the fact of conviction on both counts might have affected the sentences imposed for each, we remand for reconsideration of sentencing. See *United States v. Rizzo*, 491 F. 2d 1235, 1236 (2nd Cir., 1974); *United States v. DeMarco*, 488 F. 2d 828, 833 (2nd Cir., 1973); *United States v. Mancuso*, 485 F. 2d 275, 283 (2nd Cir., 1973); *United States v. Mapp*, 476 F. 2d 67, 83 (2nd Cir., 1973). (*United States v. Sperling, et al.* (2nd Cir., Dockets 73-2363 et. seq., decided October 10, 1974) at p. 5669 slip. op.

II

Without petitioners ever having had an adversary hearing on the issue, despite their request, and notwithstanding substantial evidence to support their contention that the witness Ramos' testimony about petitioners was directly derived from information uncovered pursuant to the illegally seized Diane's Bar wiretaps, the Second Circuit came to the erroneous, *ex parte* conclusion based on misreading the record that, "there is no indication in the record nor was there any claim by any of the defendants that the police identified Ramos or asked him to testify as a result of evidence uncovered by the wiretaps." The facts in the record directly support the claim made by the defen-

dants "that the police identified Ramos or asked him to testify as a result of evidence uncovered by the wiretaps". The facts in the record directly contradict the statement of the Circuit and prove (1) that at the least, an inference is raised in the record that although Ramos was arrested, tried and convicted in Ohio for the Toledo heroin possession as a result of a separate investigation unconnected to petitioners, the agency investigating petitioners did not know of Ramos connection to petitioners, and Ramos did not reveal information about petitioners' connection to the Toledo heroin until after that agency overheard the Havermayer bug and confronted Ramos with the Havermayer bug conversation (fruit of the Diane's Bar tap) in which petitioners revealed their own roles in the Toledo heroin delivery, and (2) that petitioners asked in the District Court to be permitted to elicit at a hearing the facts to prove this contention, but were denied such a hearing when the Trial Court ruled the Diane's Bar taps lawful and precluded an evidentiary tracing of the flow of the investigation which succeeded the illegal wiretaps.

The chronology of the events comprising the poisonous tree and its fruit is as follows. In December, 1971, the New York City police began to tap the conversations at Diane's Bar. They continued tapping at the Bar through January and early February, 1972, in a manner which was held by the Second Circuit to be unlawful and unauthorized.

In addition, the Diane's Bar taps were a result of an entire series of unlawful police activities in contravention of the Fourth Amendment and State and Federal wiretap statutes. (See discussion of the other illegalities, *infra* at the conclusion of this Point) The conversations and information and resultant police surveillance obtained in those taps were used to follow petitioners to Ray's Stationery Store, to Steve's Air Conditioning Store, and,

finally, to the Havermayer Social Club, and to tap and bug petitioners at each of these places. Incorporated in the succeeding tap application affidavits were references to Diane's Bar conversations and to the February 3, 1972 arrest of petitioners Dellacava and Guarino discovered during those taps, and to each of the intervening orders and affidavits which were based on Diane's Bar and which preceded the particular application then before the issuing judge. The affidavit for the Havermayer Social Club eavesdropping order of September, 1972, was no exception; it owed its existence to the information and succeeding taps uncovered pursuant to the Diane's Bar taps. (See Appendix H to this Petition). And, it was the conversation in the Havermayer Club, monitored on October 2, 1972, which revealed that petitioners had been involved in a heroin delivery to Toledo, Ohio. Up to this point, the police who were investigating and tapping petitioners had no information of any involvement of petitioners with Joaquin Ramos or the Toledo seizure and arrests.

Ramos had been arrested for this crime a year earlier in November, 1971, pursuant to an entirely separate investigation, and he was tried and convicted in Ohio in late September 1972, only a few days prior to the Havermayer overhear. At the time of the Havermayer overhear in October, 1972, Ramos had been in police custody in Ohio for one year, tried, convicted and sentenced for the crime, but he had not cooperated or talked to police authorities about his narcotics associations. The fact that one month after the Havermayer overhear, Ramos first revealed to law enforcement authorities his connection to petitioners and their connection to the Toledo heroin, raises the reasonable inference that the police monitoring Havermayer, learned of petitioners connection to Ramos and, then requested

him to testify against petitioners. Thus, the case is made proving the direct derivation of Ramos from the Diane's Bar taps. (*Gelbard v. United States*, 408 U.S. 41, (1972); *Wong Sun v. United States*, 371 U.S. 471 (1963); *United States v. Tane*, 329 F. 2d 848 (2nd Cir., 1964).

This Court has specifically held that an extension of an original order, or a subsequent order based on interceptions monitored pursuant to an original order, is the tainted fruit of illegalities in the issuing or monitoring of the original order. *United States v. Giordano*, 94 S. Ct. 1820, 1834-35 (1974). Thus, there can be no question here that the discovery of the incriminating Havermayer conversation was a direct fruit of the illegal Diane's Bar tap. Since, as petitioners have alleged, the police then exploited this lead to find Ramos in jail in Ohio and request him to reveal his connection to petitioners and petitioners' connection to the Toledo heroin, Ramos' in court testimony was a direct result of evidence uncovered by the wiretaps. That the taps played the crucial role in the uncovering of the evidence connecting petitioners to Ramos and Toledo is verified by the further admissions of the monitoring authorities themselves when they, according to law, attested in their eavesdropping and wiretapping affidavits that other investigative techniques were getting them nowhere and they needed the taps to get the crucial evidence. If they had had Ramos' information or if they were going to get Ramos' information anyway, they could not, and would not, have stated the fruitlessness of other investigative techniques. When the policemen make such statements about the crucial role of electronic eavesdropping in their investigation, they may not later credibly argue that the other conventional sources of evidence were responsible for their discoveries.

> As the Government asserted, the surveillance and conventional investigative techniques 'would be completely ineffective except as an adjust to electronic interception.' That the extension order and the interceptions under it were not, in fact, the product of the earlier electronic surveillance is incredible . . . the Government itself had stated that the wire interception was an indispensable factor in its investigation and that ordinary surveillance alone would have been insufficient. *United States v. Giordano, supra.*

And, of course, although we argue that the police would not have discovered Ramos without the taps, what the police might have discovered without the taps is not relevant if the unlawful conduct to be deterred was, in fact, responsible for their gathering of evidence. This Court has never adopted the so-called "inevitable discovery limitation" on the exclusionary rule, because, if it did, speculation about whether evidence would have been discovered legally would replace the rule itself. As the Second Circuit itself has observed, a showing that the government

> had sufficient independent information available so that in the normal course of events it might have discovered the questioned evidence without an illegal search cannot excuse the illegality or cure tainted matter. The better the government's case against an individual the freer it would be to invade his privacy. We cannot accept such a result. The test must be one of actualities, not possibilities. *United States v. Paroutian,* 299 F. 2d 486, 489 (2nd Cir., 1962).

Since there had not been, and there still has not been, a government denial of the above factually supported

allegations of the tainted discovery of Ramos, the Court of Appeals, if it was to take an *ex parte* position at all, should have found taint, reversed all the convictions and dismissed the indictments, and we so urge this Court. However, at the least, petitioners are entitled to a full hearing at which the facts may be fully developed to reveal exactly to what extent the instant convictions have been founded on illegally seized, evidence and its fruits, and where the government would have a heavy burden given what is already established. The Court of Appeals should have applied to this case what, it has stated elsewhere, is a "restatement of principles so clearly enunciated in *Alderman v. United States*, 394 U.S. 165 (1969)", *United States v. Huss*, 482 F. 2d 38, 47 (2nd Cir., 1973),

> To compel a party who objects to the use of evidence obtained as a result of unlawful wiretapping to go forward with a showing of taint . . . and then to withhold from him the means or tools to meet that burden, is to create an absurdity in the law. 482 F. 2d at 47.

Counsel in this case did object, despite the Court of Appeals ambiguous disclaimer. (See Appendix A) Petitioners' requests to examine on the issues of the tainted discovery of Ramos were denied. The Court of Appeals in this case recognized, on the one hand,

> the defendants contended that if the Trial Court upheld any of these objections (to the Diane's Bar wiretaps) all evidence which was the product of this wiretap should be suppressed.

but held, on the other hand,

> nor was there a claim by any of the defendants that the police identified Ramos or asked him to testify as a result of evidence uncovered by the wiretaps.

The Court thus commits the very absurdity condemned in *Huss, supra:* it recognizes that petitioners objected to any tainted evidence, thereby preserving their right to go forward to show evidence and to have the government respond with persuasive evidence to the contrary, but holds they will be deprived of a hearing because they failed to go forward with evidence of taint, after the trial court had specifically precluded any taint hearings and upheld all the evidence as legally seized.

Furthermore, there were specific references at the hearings below. (See Statement, supra, for complete page citations in the record) to the need for a taint hearing prior to trial, and references to the issue of the discovery of the Ramos connection:

> . . . My chief concern, and I don't think it is a great secret, is that the witness Ramos was discovered as a result of some illegality or some illegality may have been exercised with regard to witness Ramos and I would move to suppress the witness Ramos . . . (1585-86)

The Court of Appeals here has issued the suppression order on the Diane's Bar taps as it should have been issued by the District Court prior to trial, and the refore, petitioners should not be in a worse position by virtue of the District Court's failure to rule the evidence illegally seized. If the District Court had properly ruled, a taint hearing would have followed there, and it should follow now. Otherwise the courts create another fruit of the illegally sezied evidence:

> it is as much a use of suppressed evidence to base upon it a finding that further examination will be idle, as it is to base upon it a finding that in-

> tercepted talks have not 'led' to evidence introduced at the trial. *United States v. Coplon*, 185 F. 2d 629, 640 (2nd Cir., 1950).

For these reasons, and because appellate courts cannot and should not resolve issues of fact *ex parte*, this Court has held that, despite its own opinions as to the effects on the changed weight of the evidence of the ultimate fact, the District Court must first pass on the altered state of the evidence after a full hearing. *United States v. Matlock*, 94 S. Ct. 988 (1974); *Kolod v. United States*, 390 U.S. 136, 137 (1968); *Nardone v. United States*, 308 U.S. 338 (1939); *Alderman v. United States*, *supra*. See also, *United States v. Kaplan*, 2d Cir., October 15, 1974, Docket No. 74-1580 (Frankel, J.) slip. op. at 5801-02) This case is another appellate instance of changed rulings on admissibility, and, as dictated by the above decisions, the District Court in this case must hold a full hearing in the altered state of affairs.

Finally, because the government had stated in a letter to the trial judge that it would not use the voluminous conversations monitored after the two Diane's Bar taps, the trial judge precluded defense examination of the legality of the subsequent orders and their execution. Now that it has been shown that these subsequent orders led to Havermayer and then to Ramos, petitioners preserve their objection to the trial court's order of preclusion and assert their rights to a full examination of those subsequent orders, including, among other issues, the failure of probable cause for their issuance based on innocuous conduct and conversations and on improper allegations of a "major narcotics violator" list, and based on recitations of old and stale facts without supportive updating, the failure to support the reliability of an informant in the Havermayer application, and the installation of the

Havermayer bug after the maximum effective date for that installation had passed.

The affidavit of George Eaton attached to and submitted in support of the application for an eavesdropping device at the Havermeyer Club demonstrates conclusively that the investigation of petitioners was directed to Toledo only after the incriminating conversation of October 2 was intercepted and only after Eaton had conferred with Detective Nauwens concerning that conversation and only after Nauwens had conferred with the prosecutor in Ohio to determine whether the incriminating intercepted conversations related to the testimony at the Ramos and Morris trials in Toledo. After Eaton concluded in his affidavit that petitioners had "strongly implicated" themselves in the possession of the Toledo heroin, the next step in the investigation was obvious—request Ramos to testiy against petitioners and offer him reduction of his sentence and parole.

Although the Circuit found no other unlawful procedures surrounding the Diane's Bar taps, petitioners preserve before this Court their objections to the other aspects of the orders and monitoring procedures of the Diane's Bar taps.

III

The Circuit Court declared the wiretaps intercepted at Diane's Bar, together with all subsequent wiretapping in connection therewith, to be illegal.

In fact, the Court stated:

> "Under 18 U.S.C. §2518(10)(a), Congress made clear its intention 'to require suppression where there is a failure to satisfy any of the statutory requirements that directly and substantially im-

> plement the Congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.' *United States v. Giordano*, — U.S. — (1974), 42 L.W. 4642, 4649. See also *In Re: Evans*, 452 F 2d 1239 (D.C. Cir. 1971), cert. den., 408 U.S. 930 (1972).

However, in suppressing the illegal wiretaps, the Court, while citing Congress' intent did not suppress all that flowed from the illegal wiretaps. The identity of these Petitioners was learned as a result of unauthorized listenings or illegal overheards specifically occurring subsequent to December 19, 1971.

All evidence against the defendants was gathered after December 19, 1971. All was inadmissible and should have been suppressed since it was the product of a primary unlawful act on the part of State officials, and as a result thereof, the indictment was tainted; due to the fact that it was obtained as a result of the exploitation of the aforesaid unlawful act on the part of the government. *Wong Sun v. United States*, 371 U.S. 471, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385; *Nardone v. United States*, 308 U.S. 338, 340-341; *Benanti v. United States*, 355 U.S. 96, 103; *Elkins v. United States*, 364 U.S. 206, 217; *Mapp v. Ohio*, 367 U.S. 643, 648; *Harrison v. United States*, 392 U.S. 219, 222; *Alderman v. United States*, 394 U.S. 171, 177; *Bell v. Hood*, 327 U.S. 678, 684; *Bivens v. Six Unknown Federal Narcotics Agents*, 406 U.S. 388, and most recently *Koutnik v. John Murphy et al.* (App. Div. 2d Dept.), NYS 2d (March 14, 1974)—*People v. Robinson*, 13 NY 2d 296 is cited approvingly.

> "In a government of laws, existence of the government will be imperiled if it fails to observe the laws scrupulously. Our government is potent,

> the omnipresent teacher for good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breads contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of criminal law the ends justify the means . . . would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face. *Olmstead v. United States*, 277 U.S. 438, 471, 485 (1928). (Dissenting opinion).

During December 1971, Detective George Eaton intercepted conversations knowing that he had no judicial authority to listen to that conversations. As a result of the aforementioned illegal overheards, it was developed that there was a primary and initial discovery of the Petitioners which led to the investigation herein, the indictment and evidence at the trial.

Mr. Justice Douglas, concurring in *Gelbard v. United, supra*, stated:

> "Moreover, when a court assists the government in extracting fruits from the victims of its lawless searches, it degrades the integrity of the judicial system . . . The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgment of the courts . . . Rather, . . . Judges are being invited to become the hand maidens of intentional police lawlessness by ordering these victims to elaborate on their telephonic communications *of which the prosecutors would have no knowledge but for their unconstitutional surrevillance.* (Emphasis added); See also *Koutnik v. Murphy, supra.*

Mr. Justice Douglas, in the *Gelbard* decision further dealt with occurrences such as those underlining the indictment in *United States v. Capra:*

> "We are told that police are often tempted to make illegal searches during the investigations of a lodged conspiracy. Once the police have established that several individuals are involved, they may deem it worthwhile to violate the Constitutional rights of one member of the conspiracy (particularly a minor member) in order to obtain evidence for use against others . . . The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures and forced confessions . . . should find no sanction in the judgment of the courts . . ." 92 S. Ct. 23 (1972) (Concurring).

The very record placed before this Court clearly indicates that Petitioners were "found" as the result of an unlawful intrusion upon their conversations and all that followed was the "fruit" of such unlawful activity.

It is impossible for the Government even to begin to carry its burden of dissipating the taint when its own papers make the complete admission that this investigation and ultimate indictment commenced as a result of the taint that flowed from the illegal interceptions.

The matter of discovery of Capra and the resulting surveillance of DellaCava's trip to Ray's Stationery Store is of the utmost importance. For, without the initial illegal intrusion and the leads that followed from the illegal overheards of Diane's Bar, Detective Eaton would not have discovered and investigated the petitioners.

This Court has recognized that the mere discovery of a person's identity is a crucial aspect of the invasion of

privacy which Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211, as amended, 18 U.S.C. §2510-2520, seeks to prevent. Thus, in the *Gelbard* opinion, which is so crucial to the case at bar, the Court,—noting Congress' "concern with the protection of privacy of communications . . . [which] is to be protected"—

> "The proposed legislation is intended to protect the privacy of the communication itself . . . S. Rep. No. 1097, 90th Cong., 2d Sess., 90 (1968) U.S. Code Cong. in Admin. News p. 2178".
>
> As defined in Title III "contents" when used with respect to any wire or oral communication, includes any information concerning the *identity* of the parties to such communication or the existence, substance, purport or meaning of that communication itself. *No aspect, including the identity* of the parties, the substance of the communication between them, or the fact of the communication is excluded. The privacy of the communication to be protected, is intended to be comprehensive.
>
> S. Rep. No. 1097, *supra*, at 91, U.S. Code Cong. in Admin. News, page 2179". *Gelbard v. United States*, 92 S. Ct. 2357, 2363-64, 408 U.S. at 41, Footnote 10.

It is to be noted that in *United States v. Huss, supra*, the United States Court of Appeals for the Second Circuit, in Chief Judge Kaufman's Opinion added the above emphasis.

Courts have consistently dismissed indictments based on illegal "discovery" by the government. *Smith v. United States*, 120 U.S. App. D.C. 31, 344 F 2d 545 (1965); *United States v. Tane*, 329 F. 2d 848 (2d Cir. 1964); *United States v. Coplon*, 185 F. 2d 629 (2d Cir. 1950) (if police

"had been set on the [defendant's] trail" by wiretapping, the entire prosecution vitiated); *People v. Dentine*, 21 N.Y. 2d 700, 287 N.Y. Supp. 2d 427, 428-430, 234 N.E. 2d 462 (1967) (Fuld, J., dissenting); cf. *United States v. Hagarty*, 388 F. 2d 713 (7th Cir. 1968) (electronic surveillance). See also *Broeder, Wong Sun—A Study in Faith and Hope*, 42 Neb. L. Rev. 483, 523 (1962); See alsc *People v. Martin*, 382 Ill. 192, 46 N.E. 2d 997 (1942). *Cf. Williams v. United States*, 382 F. 2d 48 (5th Cir. 1967).

Similarly, in *United States v. Schipani*, 289 F. Supp. 43 (U.S.D.C., E.D.N.Y., 1968), Judge Weinstein noted the importance of the very discovery of a person's identity in instigating and aiding an investigation.

> "If illegally secured information leads to substantially intensify an investigation, all evidence subsequently uncovered has automatically "been come at by exploitation of that illegality". The unlawful search has set in motion the chain of events leading to the government's evidence. And there has then been "a continuing . . . [and] significant participation by prosecution officials" from the time of the police misconduct to the time of the discovery of the evidence. Ruffin, Out on a Limb of the Poisonous Tree; The Tainted Witness, 15 U.S.C.A. L. Rev. 32, 38 (1967). The road from the tap to the testimony may be long, but it is straight". *United States v. Tane*, 329 F. 2d 848, 853 (2d Cir. 1964). See also Maguire, Evidence of Guilt 246 (1959) ("exclusion of evidence about secondary discoveries made possible solely or facilitated by the original violation"). U.S. v. Schipani, supra.

Constitutionally and statutorily *all* use of evidence obtained through the illegal use of wiretaps is prohibited.

The Amendment's protections would indeed be hollow if the Government could use the fruits of that evidence at will. To allow such practices would be to encourage the Government to do indirectly what the Constitution prohibits from doing directly. *Silverthorne Lumber Co. v. United States, supra; Nardone v. United States, supra; Alderman v. United States,* 394 U.S. 165, 171-172, (1969); *Weeks v. United States,* 232 U.S. 383, 390; *Mapp v. Ohio,* 367 U.S. 643, 659.

The acts of the detectives in their unauthorized listening to the petitioners conversations represent an attempt to circumvent the dictates of the exclusionary rule. As Justice Holmes stated:

> "It is desirable that criminals should be detected, and to that end, that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained . . . For my part, I think it less evil that some criminals should escape than that the government should play an ignoble part". 277 U.S. 438, 470 48 S. Ct. 64, 675 (1927) dissenting. See also *McNab v. United States,* 318 U.S. 332 (1943) and *Kerry v. Ohio,* 392 U.S. 1 (1968).

It will be needless for counsel to continue to discuss the very essence and importance of protection of the right of privacy. However, we are constrained to reiterate the dictates of the United States Supreme Court in *Berger v. New York,* 388 U.S. 41 (1967):

> "We cannot forgive the requirements of the Fourth Amendment in the name of law enforcement". (At page 62-63).

"For in the circumstances the agents willfully or negligently ignored judicial admonitions, constantly reiterated, that each one of us, suspected criminal or no, is entitled to security in or persons, houses, papers and effects until an impartial Magistrate determines that the enforcement officers have probable cause to believe the law has been violated . . .

On the other hand, a showing that the government had sufficient independent information available show that in a normal course of events it might have discovered the questioned evidence without an illegal search cannot excuse the illegality or cure tainted matter. Such a rule would relax the protection of the right of privacy . . . The test must be one of actualities, not possibilities". *United States v. Paroutian*, 299 F. 2d 486, 488-489 (1962).

The evidence is clear. Capra, Guarino and Dellacava were unknown to Federal or State authorities prior to December 19, 1971. Their names, identities, residences and habits were discovered after illegal interception of their conversations had commenced. Dellacava and Guarino were arrested as a result of illegal wiretapping on February 3, 1972 and the result of that arrest was the introduction of testimony concerning that arrest at their trial. The very fact that there existed a relationship among petitioners was learned and that relationship was characterized as illicit as a result of the exploitation of the primary illegality. Their connection to prior crimes was similarly discovered and exploited as a result of the primary illegality.

In truth, the constable was allowed to intrude into the privacy of petitioners and to slowly weave his ever increasing web of information and to surmise, suspect and

surreptitiously surveil petitioners from December, 1971 to March, 1973. No amount of judicial excising is possible to repair the intrusion and clear the pollution from which this indictment was born. The indictment must be dismissed.

IV

The delayed, warrantless vacuum search and destruction of the gym bag, conducted five days after the bag's warrantless seizure from the trunk of DellaCava's automobile, and the prior warrantless search for evidence in the automobile in an underground garage while petitioner was handcuffed and in police custody, may not be justified under any of the recognized exceptions to the Fourth Amendment Warrant requirement. Neither search was incident to petitioner's arrest; the search of the locked trunk was conducted a half-hour after petitioner's arrest and it was conducted at an underground garage to which petitioner and his car were taken by police from the scene of the arrest across town. Petitioner in handcuffs and in the custody of four policemen who had seized the keys, no longer had control over the car.[21] The vacuuming of the gym bag occurred five days later in a police laboratory while petitioner was in custody elsewhere. Both warrantless searches were removed in time and place from the arrest and conducted outside the area of petitioner's control. *Preston v. United States*, 376 U.S. 354 (1964), *Dyke v. Taylor*, 391 U.S. 216 (1968); *Chimel v. California*, 395

21. Petitioner preserved his motion on the further grounds of a delayed return on the warrant for the purpose of incommunicado detention and search. These grounds were properly raised at the hearing below, prior to trial, as the evidence developed, and the Court's refusal to entertain these grounds was error. *United States v. Middleton*, 344 F.2d 78 (2d Cir., 1965); *McNabb v. United States*, 318 U.S. 332 (1943).

U.S. 752 (1969). Nor, once it was commandeered to the garage and the keys taken, was this a movable car on the highway in a situation dangerous to the preservation of whatever evidence it might contain and certainly the gym bag in police custody for five days was not in that situation. *Chambers v. Maroney*, 399 U.S. 42 (1970); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). There were no exigent circumstances offered to explain a pressing need for an immediate search of the car, and the police could afford to wait five days to vacuum the bag, during which time, both the car and petitioner were in police custody. *United States v. Garay*, 477 F. 2d 1306 (5th Cir., 1973).

The agents attempted at first to justify their action on these "search incident" grounds, but abandoned that justification. At the hearing below, a new justification was offered to uphold the obviation of a warrant, "the inventory search." Both the District Court and the Second Circuit found as to the belated inventory theory, that "this justification has little or no support in the record". Indeed, it could not have had, because, as to the gym bag, when the vacuuming was done five days after the car search, all visible valuables had been seized. The protection of petitioner's property or the protection of the police from charges of theft or destruction could hardly have been the purpose behind the literal destruction of the bag in the process of the vacuuming. Cf. *Cooper v. California*, 386 U.S. 58 (1967). In any case, both Courts below recognized that the circumstances of this search and seizure evinced a clear intention to uncover evidence of crime.

> "The government contended at the hearing that this was a routine inventory search for the protection of the defendant's property, but the trial court properly rejected that argument because, even though the police may have 'exercised a form of custody or control' over the car, they clearly

> conducted the search for the purpose of securing incriminating evidence. *Cady v. Dombrowski*, 413 U.S. 433, 443 (1973)."

The confusion of the agents and the police over how to legally justify what was actually a warrantless search for evidence in the car, and in the bag, thereafter, extended into the testimonial slip-of-the-tongue by Agent Samuel, "at that time we intended to seize the car—excuse me, impound the car for safekeeping." (144).[22] Detective Eaton, who observed his superior, Sergeant Restivo, find the gym bag, testified he thought that an inventory was usually made during a search that was already being made for other reasons.

> A. I believe it is police department and Federal procedure, *when you search a vehicle* you have to inventory any valuables inside the car. (268) (emphasis added)
>
> A. *If the car is going to be seized* it is a department regulation to safeguard any valuables in the car . . . (269) (emphasis added).

Thus, the impatience of the Court below with the asserted inventory justification, an impatience which finally extended to cutting off further questioning on the important issue of the specific police regulation that provided authority for an inventory search. (269-270).[23] The police

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22. The action of the four agents and police in leaving the car unattended in a sanitation garage after the search was completed and appellant was being taken to the precinct, does not support their concern for its safety (198).

23. Actually those procedures were not followed according to the regulations which provide only for a list of the items, not their seizure. In addition, the car is to be delivered to the station house of the arrest, and after a Property Clerk's Motor Vehicle Invoice (PD 571) is prepared, the automobile is to be sent to the Property Clerk's vehicle storage facility without delay. *Patrol Guide — Procedures* at 11-148 ¶ *Arrests, Narcotic Drug, Untaxed Cigarettes or Gambling Records, Vehicle Seized.*

must be charged with an understanding of the lawfulness or unlawfulness of their actions, and if they are "confused", or if the law is confused on their authority to search, then the necessity for a neutral judicial determination is clear, and that is the purpose of the warrant. *United States v. Lawson*, 487 F.2d 468 (8th Cir., 1973).

Furthermore, this was a planned seizure of the automobile. The agent and the detective both testified that they planned to wait until petitioner got into his car and drove away from the restaurant before they would arrest him. Twelve agents were there surveilling him and the restaurant. They knew they would arrest him in his automobile, and they had the time and the manpower to get a search warrant for the "inventory", they must have known they would make. To this extent, whatever evidence came into their plain view during the "inventory" search was not inadvertent; it was planned and a warrant should have been obtained. *Coolidge v. New Hampshire, supra; United States v. Young*, 489 F.2d 914 (6th Cir., 1974). *Harris v. United States*, 390 U.S. 234 (1968), is distinguishable, notwithstanding the "inventory" grounds upon which the seizure was sustained in that case. There was, in fact, no search in *Harris;* the officer was rolling up the window, a measure reasonably and unequivocally protective of the car,[24] when he inadvertently spotted the evidence he seized. Since the car in *Harris* was seized as the instrumentality of the crime, after it had been seen leaving

24. "While police custody may justify reasonable measures to protect the vehicle itself, (i.e., rolling up the windows and locking the doors), or property within plain view in the automobile, such reasonable protective measures do not extend to breaking into a locked trunk . . . It is not obvious to us, as it appear to be to some courts, why the inventory procedure offers the police any more protection against false claims than would a standard policy of locking the car and returning the keys to the owner; or of allowing the owner to make arrangements himself for the removal and storage of his vehicle." *United States v. Lawson, supra,* at 475-476.

the scene of a robbery, it was the target of the seizure and not just the place chosen by the police in advance to make their arrest of the suspect. When the police know they are going to impound a vehicle and they have the time prior to the search or seizure, a warrant is required. *United States v. Young, supra.*

Finding themselves unable to accept the Government explanations of the car search and subsequent vacuuming, the Courts below discovered a justification never put forth by the Government, wholly unsupported by the facts in the record, and legally insufficient: "the automobile could readily have been thought subject to forfeiture, and perhaps should have been labeled for that purpose, though it was not." (District Court Slip. Opinion at p. 4, See Appendix, *infra*). The Court, admitting that it was going outside the record to find the facts with which to support this theory, disregarded the plain testimony of the agents. Although the forfeiture statutes require probable cause to believe the vehicle seized is, or has been, used to transport narcotics, (490 U.S.C. 3782; 21 U.S.C. Section 881(b)), the agent, when pressed by counsel on this point at the hearing, denied any such knowledge.

> Q. Well, was yours a curiosity—was your curiosity about what was in his car based in any degree upon what you had learned about Mr. Dellacava?
> A. I wasn't that familiar with him so I probably would have to say no.
>
> * * *
>
> A. Well, I heard that his car had been used on prior occasions, so I was just curious to see his car.
>
> Q. Been used on prior occasions for what?
>
> A. While he was under surveillance.
>
> Q. For what?

A. Transportation.

Q. Used for transportation of what?

A. Of Mr. Dellacava.

Q. And what else?

A. I'm not familiar with the case.

Q. You don't know what Mr. Dellacava used to transport, right?

A. I couldn't say, no.

Q. And you knew that Mr. Dellacava used his car for transportation is what you are saying, right?

A. Yes, sir.

Q. So you had curiosity about what was in it, right?

A. Yes.

Q. And that was the whole basis for your curiosity, right?

A. That's right. (176-177)

Q. You really were curious to know if there were drugs in the car?

A. If there was anything in the car.

Q. Anything of a criminal nature, right?

A. Anything.

Q. Criminal or not criminal, right?

A. That is correct.

Q. You wanted to know what was in the car, period, criminal or not, right?

A. That is correct. (179)

The District Court recognized that this testimony was a factual admission that the arresting and searching officers

had no probable cause to believe there was, or had been, contraband in the vehicle, ("the officers tended to downplay their knowledge . . . as well as their interest in his vehicle. . ."), but the Court pointed to Detective Eaton's presence at the scene of the arrest and search as evidence that the arresting and searching agents had some kind of latent, but unexpressed, probable cause. The Court was further disregarding Detective Eaton's own testimony that he did not participate in the search (265), and had not communicated any of his knowledge of the case to the arresting Agent Samuel.

> A. We did not, as far as I know, discuss this case, or I didn't even know he was involved in this case.
> Q. So you hadn't worked with him on this case before? Is that your testimony?
>
> A. As far as I know, yes.
>
> Q. And you hadn't funnelled any information to him in the prior eight months before this arrest was made, to Samuel, is that correct?
>
> A. Not so far as I can recall. (247).

In addition, Detective Eaton admitted to no specific knowledge about the use of this particular automobile in the transportation of narcotics.

> Q. These people might clean out their cars; right? That was a problem, too; right?
>
> A. I have no idea what they do with their cars. (278).

We submit that since the officers denied having any "facts and circumstances within their knowledge" and denied any "reasonably trustworthy information" that the car had been used as a narcotics transport, they had no probable cause for its seizure under the forfeiture statutes. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). The lower Courts'

decisions, in disregard of the officers' testimonial denials of probable cause, is against the weight of the evidence and should be reversed.

We further submit that the "realities", two factors considered by the Courts to be within the latent but unexpressed, knowledge of the officers at the time of the arrest, were insufficient to supply probable cause to believe that the car in question was a narcotics transportation vehicle. Neither of the factors, Detective Eaton's knowledge about prior narcotics activity of DellaCava, at other places, times and with other vehicles, and the narcotics indictment against him for past acts, had anything to do with this vehicle, and they relate to past events. These factors could not have given the police the kind of "absolute" knowledge that the car was used for contraband, necessary for a plain view seizure of the instrumentality of crime. *Lockett v. United States*, 390 F. 2d 168, 172 (9th Cir., 1968), cert. den. 393 U.S. 877. "Only where it is immediately apparent to the police that they have evidence before them", will such a plain view seizure be justified. *Coolidge v. New Hampshire, supra*, at 459.

Acceptance of these two factors as constituting probable cause for a seizure and search of petitioner's vehicle, is to say that probable cause from past events and places gives the police a continuing authority to search petitioner's property at any time and place. The cases do not support this proposition. *Sgro v. United States*, 287 U.S. 206 (1932); *Schoeneman v. United States*, 317 F. 2d 173 (D.C. Cir., 1963); *United States v. Bailey*, 958 F. 2d 408 (9th Cir., 1972). There is, "a necessity for search reasonably referable to a contemporaneous violation of law." *House v. United States*, 411 F. 2d 725, 728 (D.C. Cir., 1969) cert. den. 339 U.S. 915 (1970). An arrest in an automobile on a warrant for the defendant's past narcotics violations, when

no evidence exists to show that the defendant was transporting narcotics at that time in that automobile, does not support a search and seizure of the automobile. *United States v. Stevenson*, 409 F. 2d 354 (7th Cir., 1969) cert. den. 404 U.S. 851; *Lott v. United States*, 218 F. 2d 675 (5th Cir., 1955). If the evidence does not show that the automobile was actually used in an illegal transaction, it may not be seized subject to forfeiture. *Platt v. United States*, 163 F. 2d 165 (10th Cir., 1947).

Probable cause as to a particular vehicle or house does not give the police probable cause as to any person who happens to be in it, so probable cause as to a particular person does not give the police probable cause as to every vehicle or house in which he is found.[25] *United States v. Collins*, 439 F.2d 610 (D.C. Cir., 1971); *United States v. DiRe*, 159 F.2d 818 (2d Cir., 1947); aff'd 332 U.S. 381; *Spinelli v. United States*, 393 U.S. 410 (1968); *Howard v. United States*, 423 F.2d 1102 (9th Cir., 1970) (car not seizable subject to forfeiture, simply because defendant, who committed crime, drove to scene in it). The Second Circuit held as much in *United States v. Squires*, 456 F.2d 967 (1972). There the police had a warrant for the arrest of the defendant for driving a car with a noisy muffler. The impounding of a second vehicle in which he was arrested was held to be without probable cause.

Cady v. Dombrowski, 413 U.S. 433 (1973) and *Cooper v. California, supra*, are not on point. The holding of *Cady* is:

> Where, as here, the trunk of an automobile which the officer reasonably believed to contain a gun,

25. The Second Circuit stated: "While agreeing with the trial court that the question is a close one, this court finds no basis for reversing the district court's holding that the search on balance should be held lawful, and that there was probable cause to believe that the car was being used to carry contraband on the night of the arrest." (Appendix A)

> was vulnerable to intrusion by vandals, we hold that the search was not "unreasonable" within the meaning of the Fourth and Fourteenth Amendments. 413 U.S. at 448.

Thus, *Cady* is an exigent circumstances case, and, as we have argued above, no such circumstances present themselves in this case, nor was there probable cause to believe anything specific, let alone anything explosive, was to be found in the trunk.

In *Cooper v. California*, 386 U.S. 58 (1967), the arrest of the defendant was for a narcotics violation involving the vehicle, which was, in fact, impounded for forfeiture: "They seized it *because* of the crime for which they arrested petitioner." 386 U.S. at 61 (emphasis supplied). Here, petitioner was arrested because an indictment had been found against him and he just happened to be in the vehicle at the time. Thus, "closely related"[26] as used by this Court in *Cooper* must be understood in light of the facts of that case. The fact that the gym bag was cut to pieces in the vacuuming process hardly bespeaks of custodial safeguard pending formal forfeiture proceedings. Also, the fact that actual forfeiture proceedings were instituted in *Cooper*, that the car was retained for four months for that purpose and that the police, from the moment of the seizure, understood this was the nature of their action is an important distinguishing factor. In this case, no forfeiture proceedings were ever instituted, the car was returned to petitioner's family two weeks later,[27] the bag was

26. "Their subsequent search of the car . . . was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained." 386 U.S. at 61.

27. A retainer of the car for longer than two weeks without institution of formal forfeiture procedures, i.e., reasonable notice, would have been a deprivation of due process of law for the purpose of those proceedings. *Robinson v. Hanrahan*, 93 S.Ct. 30 (1972).

destroyed, and the first time forfeiture was ever mentioned as a justification was by the District Court below after a hearing on a motion to suppress, and after the agents and the Government had failed to sustain a series of other belated pretexts for this search. The pretextual nature of the entire arrest and search procedure is evident, not only from the delayed arrest until petitioner reached his automobile and drove away,[28] but by the failure of the police to take the forfeiture action the Court said they were taking. This is not a question of various and varying theories, although this tactic in itself evidences pretext, (*United States v. Mallides*, 473 F.2d 859, 861 n. 3 (9th Cir., 1973), but a question of abuse of police power; the offering of some legal justification for what is in fact an unlawful purpose. Just as the failure to charge the crime for which an arrest was allegedly made is an indicator of unlawful pretext, then the failure to institute the forfeiture proceedings here, evidences pretext in this case. *United States v. Lefkowitz*, 285 U.S. 452 (1932). Just as the fact that police have an abstract power to stop vehicles for license and registration without cause, does not end the inquiry as to the misuse of that power, an abstract forfeiture power cannot end it here. *Bowling v. United States*, 350 F.2d 1002 (D.C. Cir., 1965); *Amador-Gonzalez v. United States*, 391 F.2d 308 (5th Cir., 1968); *United States v. Mallider, supra; Taglavore v. United States*, 291 F.2d 262 (9th Cir., 1961); *United States v. Borcich*, 460 F.2d 1591 (10th Cir., 1972). See also *United States v. Robinson*, and *Gustafson v. Florida*, 94 S.Ct. 467, et seq. (1973) at 470 n. 2, 477 n. 6 and 492. Thus, in this case, even if the police had the power to seize the car for forfeiture pur-

28. *Amados-Gonzalez v. United States*, 391 F.2d 308, 314 (5th Cir., 1968); *United States v. Martinez*, 465 F.2d 79, 82 (2nd Cir., 1972); *McKnight v. United States*, 183 F.2d 977 (D.C. Cir., 1950).

poses, the fact that they did not do so, and the fact that they took measures directly antagonistic to the purpose of the forfeiture (the preservation of property), precludes their actions from taking on the imprimator of that legality.[29]

Finally, even if forfeiture was a proper justification for the police action here, there is nothing in the nature of that action, which can be taken on probable cause only, which removes it from the Warrant prescriptions of the Fourth Amendment. The probable cause to believe the car contains contraband is the same Fourth Amendment probable cause, whether or not forfeiture proceedings are invoked. Since probable cause, in the absence of exigent circumstances, is not enough to justify search and seizure without a warrant (*United States v. Bradshaw*, 490 F.2d 1097 (4th Cir., 1974), a statute, be it 49 U.S.C. Section 781 *et seq.* or 21 U.S.C. Section 801 *et seq.*, which purports to excuse the Warrant requirement is unconstitutional. The statutes themselves contain provisions coincident with the Fourth Amendment. 21 U.S.C. Section 881(b) has provision for seizure upon "process" with enumerated exceptions paralleling the exceptions to the Warrant requirement developed in the search and seizure case law, and 49 U.S.C. Section 786 states that, "the provisions of this chapter shall be construed . . . not to impair in any way, existing provisions of law . . . providing for the seizure . . . of forfeited property." The exclusionary rules developed to preserve Fourth Amendment rights have been held to apply to forfeiture actions. (*One Plymouth Sedan v.*

29. "Congress did not intend to allow the seizure and forfeiture of personal property by the Government when activity by the same Government subsequent to the seizure made it impossible for the claimant to satisfy the burden of proof statutorily required of him". (To prove that the car did not contain contraband after Government has destroyed the contraband). *United States v. One 1966 Chevrolet Sedan*, 14 Cr. L. 238, 2389 (D.C.S. Fla., January 16, 1974).

Pennsylvania, 380 U.S. 693 (1965); *United States v. One 1963 Cadillac Coupe de Ville, Two Door*, 250 F. Supp. 183 (D. C. Mo., 1966)). Recently, the Sixth Circuit reaffirmed the Warrant requirement in forfeiture:

> The police cannot seize an automobile on the theory that it is an instrumentality of a crime which is in plain view in calculated disregard for the Fourth Amendment requirement that application be made to a judicial officer for a search warrant absent exigent circumstances . . . when law enforcement officers have prior knowledge amounting to probable cause establishing the nexus between the article sought and the place of seizure a warrant must be obtained in order to protect the Fourth Amendment principle that warrantless seizures are per se unreasonable in the absence of exigent circumstances. *Lewis v. Cardwell*, 476 F. 2d 467 (1973).

This Sixth Circuit judgment was reversed by this Court, but without a majority overruling the Circuit's reaffirmation of the Warrant requirement in forfeiture situations. Indeed, the four Justices who voted to uphold the search and seizure in *Cardwell v. Lewis*, 15 Cr. L. 3163 (No. 72-1603, decided June 17, 1974), did so because probable cause to seize the vehicle was conceded and because there was no Fourth Amendment search or seizure in the taking of paint samplings from the exterior of the car, an area of the car not protected by an expectation of privacy. In so holding, the same four Justices distinguished, without deciding, the issue of the necessity for a warrant where a car's interior is searched.

> Again, we are not confronted with any issue as to the propriety of a search of a car's interior.

> 'Neither *Carrol, supra,* nor other cases in this Court require or suggest that in every conceivable circumstance, the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords.' *Chambers v. Maroney,* 399 U.S. at 50. *Cardwell v. Lewis, supra,* at 3166 n.8.
>
> *Coolidge* concerned a thorough and extensive search of the entire automobile including the interior from which, by vacuum sweepings, incriminating evidence was obtained. A search of that kind raises different and additional considerations not present in the examination of a tire on an operative wheel and in the taking of exterior paint samples from the vehicle in the present case for which there was no reasonable expectation of privacy. Id. at 3166 n.9.

Thus, the instant case is the one distinguished in *Cardwell* and should be decided now on the basis of this Court's view of *Coolidge, supra,* and the other precedents cited above which have retained the requirement of a Warrant.[30] In addition to the same extensive search circumstances present in *Coolide,* this case presents the special circumstance, totally ignored by the Second Circuit in its opinion below, that the incriminating heroin tracings were not only seized directly from the interior of the car, but seized after a total mutilation and destruction of a gym bag five days after the bag's seizure from the interior of the

30. It should also be noted that the four Justices in the majority in *Cardwell* also found exigencies to excuse the Warrant requirement when the defendant sought to have his wife take away the car. Id. at 3167. No exigencies were present in this case.

car.[31] Certainly if a Warrant is ever required, it should be required when the search will destroy the private property involved. cf. *Rochin v. California*, 342 U.S. 165 (1952). Finally, following this Court's decision in *Cardwell*, the Ninth Circuit Court of Appeals held that no forfeiture statute could justify an otherwise unconstitutional search, and that a warrantless search under that statute must be justified by one of the traditional exceptions to the Warrant requirement. *United States v. McCormack*, 15 Cr. L. 2433, decided July 17, 1974; see also *Almeda Sanchez v. United States*, 413 U.S. 266 (1973).

To the extent that *Cooper v. California* is inconsistent with this position, it should not be controlling, since it is premises on a test of Fourth Amendment reasonableness overruled in *Chimel v. California*, 395 U.S. 752 (1969). *Cooper* relied on *United States v. Rabinowitz*, 339 U.S. 56 (1950), for the proposition that the test of Fourth Amenement reasonableness was not whether the police could have gotten a warrant, but whether the search was reasonable. The Court in *Chimel* specifically overruled *Rabinowitz* on this test of Fourth Amendment reasonableness, saying "it can withstand neither historical nor rational analysis." 395 U.S. at 760.

31. "Had the luggage been taken elsewhere to be searched at leisure the failure to utilize that leisure to apply to a magistrate might be a factor in the reasonableness calculus, though Chambers dealt with, and permitted, just such a search in the circumstances there presented." *United States v. Soriano*, 497 F.2d 147, 150 n. 6 (5th Cir., 1974;. This Court permitted the delayed warrantless examination of an arrestee's clothing in *United States v. Edwards*, 94 S.Ct. 1234 (1974), because after arrest, there is no longer a Fourth Amendment right to the privacy of the person. But, in *Edwards*, this Court distinguished, citing with approval, the language in *United States v. DiLeo*, 422 F.2d 487, 492-93 (1st Cir., 1970), which upholds the right of privacy in the *place* of arrest, be it a home or office or automobile, precluding delayed warrantless searches of items seized from those places.

> that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interest. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point. 395 U.S. at 764-765.

The Court in *Chimel* rejected the *Rabinowitz* majority, adopted Mr. Justice Frankfurter's dissent, which rested on the crucial, historical role the Warrant has played as the bulwark of the Fourth Amendment, and reinstated the necessity for a Warrant in the absence of exigent circumstances as the test of Fourth Amendment reasonableness. *United States v. Rabinowitz, supra,* at 69, 83 (dissenting opinion); *Chimel v. California, supra,* at 760-761. To the extent that *Cooper* relied on *Rabinowitz's* overruled rationale, *Cooper* is not controlling.

Since no warrant was obtained prior to the seizure and search of the automobile in this case, and since no warrant was obtained prior to the vacuum search of the gym bag, and since there were no exigent circumstances to justify action without a warrant, the heroin tracings, money, bag and heat sealing machine should have been suppressed. Since the heroin tracings found in the bag were the only physical substance found directly in petitioner's possession, its inclusion in evidence had a prejudicial and devastating effect on the jury and was not harmless error; the conviction must be reversed.

One further point is raised by the Second Circuit's opinion on this issue. Although, as argued above, both Detective Eaton and Agent Samuel disclaimed any knowledge or founded suspicions about petitioner's use of his automobile on the night of the arrest, and although Eaton testified he had not communicated anything to

Samuel about Dellacava, the Second Circuit found, by piling inference upon inference, that because Samuel had heard eight months prior to the arrest that Dellacava had been involved in the Toledo delivery (1) Samuel might then have known that Ramos had turned State's evidence six months prior to the arrest, and (2) that all this permitted the further inference by an appellate court that the lower court might have inferred that the Agent might have inferred six or eight months after the operation of the preceding inferences, that Dellacava was carrying narcotics on the night of arrest. (See Appendix A, n. 12). The spuriousness of this basis for probable cause shocks the conscience. Firstly, all of this supposed information, which Samuel denied having, was learned by him six to eight months prior to the arrest and was itself about events a year before that. (See the argument and cases cited above concerning the staleness of probable cause). Secondly, surmise on the part of the Second Circuit as to issues of fact not proved, or even offered, by the government below to establish the prima facie legality of the search (and not even contained in the opinion of the District Court that heard the evidence) has specifically been prohibited by this Court and others. (See argument and cases cited above on the question of the deprivation of a taint hearing). Finally, since the government, at the hearings in the District Court, relied only on the outstanding indictment against DellaCavaand the circumstances on the night of the arrest to meet their burden of going forward on the legality of the search, and since the government had specifically announced to the District Court that it was not using the wiretaps succeeding the Diane's Bar conversations, they and the Second Circuit should be precluded from relying on the taps now to establish probable cause for the arrest and search. To the extent they do so rely on them now, the arrest and search become the tainted product of those taps

and the evidence so obtained must be suppressed or, at least, a hearing ordered to establish that taint. *Wong Sun v. United States, supra; Alderman v. United States, supra.*

V

The United States Court of Appeals, in confirming the Findings of Fact so eloquently presented by the Trial Judge, with regard to the pre-trial publicity which took place herein refused to "suppress the indictment".

However, after the fact, the Court of Appeals further indicated that the Government had misstated to the Trial Court.

> "The Government denied that the press was allowed to attend the entire briefing, and asserted that, in accordance with the public relations guidelines of the Department of Justice, 28 C.F.R. §50.2, the reporters were provided only with the names of the defendants, their addresses, ages, marital status and the charges against them. Nonetheless, the Trial Court pointed out that newspaper photographs showed the briefing session in progress, and that the newsmen appear to have been fully cognizant of the code words and communications systems to be used."

Furthermore, the Court of Appeals found

> ". . . allowing members of the press to attend pre-arrest briefings of the police presents the grave danger that undue publicity will, in advance of the trial, convict the accused in the minds of the general public and seriously prejudice his right to be accorded a fair trial by an impartial jury . . . In the exercise of its supervisory powers, *United States v. Marshall*, 360 U.S. 310 (1959), this Court

> is of the opinion that the Government must not *allow* the press to be present at such meetings."

Apparently, the Court of Appeals was as concerned about the pre-trial and pre-arrest publicity as was the Trial Court—however, neither was able to fully exercise its supervisory power, other than in pronouncing an edict that it shall not occur. We indicate, most respectfully, that this Court must exercise its supervisory power in indicating it should not have occurred, and that these Petitioners should not be treated differently than others.

The concept of indictment dismissal as a result of inappropriate governmental action with regard to publicity, is not a new one. In fact, the same Court of Appeals stated, in *United States v. Pfingst*, 477 F2d 177 (1973):

> "We see no need whatsoever for further deterrent action, as the Assistant United States Attorney has been warned by the District Court and has freely admitted the error." (p. 189)

In *United States v. Lustman*, 258 F2d 475, the Court held:

> "We think that the showing of prejudice is not required when a defendant is asserting a Constitutional right." (p. 477, 478)

The rights placed before this Court by the Petitioners are fundamental rights.

The Petitioners contend that the actions of the governmental authorities with regard to the true administration of justice, were improper and said conduct should be properly reviewed by this Court, especially, in these days, where the media prints so-called "improper" matters and disguises them as "leaks", where defendants are made the subject of nation-wide publicity and where the media have com-

menced to play an important role in determining defendants rights.

The Petitioners contend that this Court should take into consideration all of the factors relating to the publicity herein, and that this issue is important for review, in that, to allow a case to stand where the Government actively caused the "massive and lurid publicity", would only set a precedent whereby others may be tried in the press and whereby others may not be able to enjoy a fair trial.

The Petitioners assert that, as a result of the massive, lurid and prejudicial publicity, they were unable to receive a fair trial. They further assert that the findings of the Trial Court and the Court of Appeals inure to their benefit in "suppressing the indictment" or, alternatively, at a minimum, sending it back for a hearing, with guidelines from this Court to determine the standards of proper conduct in the prosecution of cases.[32]

In fact, the Trial Court found:

> "The events leading to the trial in this case included actions by law enforcement officers resulting in massive and lurid publicity for their activities. The defendants herein were amongst scores taken in a "roundup" in the night and morning of April 13-14, 1973. The numerous arrests were supposedly to be accomplished with the upmost secrecy, yet press reporters and photographers were invited to be present, and it worked, through all the stages of the operation." Memorandum on Pretrial Publicity, (Appendix C)

32. Petitioners respectfully refer this Court to the following article which appeared in the May, 1974 issue of *Psychology Today* — "How Not To Get A Fair Trial" by Stanley Sue and Robert E. Smith — pp. 86 and 90.

The Court of Appeals confirmed the Trial Court's determination that the office of the United States Attorney, the Chief Narcotics Prosecutor, the Assistant who alternatively tried this case, together with various law enforcement officers[33] including high officials of said agencies had actively participated in aiding the press with regard to the dissemination of Pretrial Publicity.

The aforementioned "Memorandum" opinion written by the trial judge detailed the facts regarding the action of top members of the United States Attorney's staff in allowing this case to become so permeated with publicity.

> "If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither *prosecutors. . .* nor *enforcement officers* coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures. *Sheppard v. Maxwell,* 384 U.S. 333, 363, 16 L. ed. 2d, 600, 620 (1966). (Emphasis added).

The Trial Court in the nineteen page decision detailed the facts that caused the court "grounds for concern". The Trial Court continued:

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33. New York City Police Department and agents of the Bureau of Narcotics and Dangerous Drugs.

> "As for the court itself, 'our supervisory power', if it means something, must entail an alert sensitivity to indications that the federal prosecutor and/or federal law enforcement officers have participated in or quietly, condoned, transgressions against court rules, executive rules, and commands of the Constitution. Memorandum on Pretrial Publicity, *United States of America v. John Capra, et al,* Frankel, D.J. (Appendix C)[34]

The trial court in the very complete "Memorandum on Pretrial Publicity" found that Rule 8 of the General Rules of the United States District Courts for the Southern District of New York "appeared *very possibly* to have been violated." (Emphasis added). P. 5. Recently, the United States District Court for the Northern District of Illinois stated with regard to the question touched upon herein:

> ". . . Sheppard v. Maxwell, . . . established the principle that a criminal defendant need only show a *probability* of prejudicial circumstances to obtain reversal of his conviction. If convictions are to be overturned on a showing that publicity *probably* affected the outcome, attempts by court rule to forestall such publicity must be judged by the same standard". *Chicago Counsel of Lawyers v. Bauer,* 14 Cr. L. 2449, 2450 (USDC . . . N. Ill., 2574). (Emphasis added).

The problem of prosecutorial action as related in this

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34. The publicity Judge Frankel discusses in his Memorandum on Pretrial Publicity merely occurred prior to trial. During the trial several jurors indicated reading an article in The New York Times (Court Exhibit 2), and of the four jurors one said that it was similar to the events at hand (391-408, 416, 428-431). See also: The New York magazine article (Court Exhibit 4, 3079-3088) the "Thanksgiving Articles" and the Readers Digest Article concerning the defendants; also, counsel's letter of December 24, 1973 at p. 8 thereof.

case has apparently been recognized by the Justice Department itself.

> "The Department of Justice also has a commendable-founding rule, which might be read to proscribe press briefings and photographic arrangements for 'secret' arrests on serious indictments". Memorandum on Pretrial Publicity, *United States of America v. John Capra, et al.* Frankel, D.J.) See also 28 CFR Sec. 50.2.

> "For Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief that gave it birth . . . Under any other rule a Constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality". *Weems v. United States*, 217 U.S. 349, 373, 54 L. ed. 793, 801 (reaffirmed in *Brown v. Board of Education*, 347 U.S. 483, 492-493, 98 L. ed. 873, 879, 880; also reaffirmed in *Estes v. Texas*, 381 U.S. 532, 564-565; 14 L. ed. 2d 543, 562-563 (1965).

Judge Frankel in the Memorandum on Pretrial Publicity recognized a possible due process violation.

> "The question of the integrity of the Department's own functioning might have been supposed

to cause concern in that quarter, quite apart from the now familiar principle that an agency may deny due process if it fails to obey its own regulations".

Two further factors entered into the governmental participation in this case:

(a) the fact that the Justice Department has recognized that this type of conduct should not occur; and

(b) that there is a due process proposition involved with regard to the actions in this case.

This Court has recognized that prejudicial dissemination of news to the media can severely hamper the due process rights of an accused. *Sheppard v. Maxwell*, 384, U.S. 333, 16 L. ed. 2d 600 (1966); *Estes v. Texas, supra; Rideau v. Louisiana*, 373 U.S. 723, 10 L. ed. 2d 663, (1963).

In *Rideau v. Louisiana, supra*, this Court had before it a record which did not show who initiated the tainted interview. However, it obviously was done with the active cooperation of law enforcement officers. This court concluded that this publicity was a subtle but no less real deprivation of due process. Nowhere in the majority opinion was there even a suggestion that the community was so permeated with hostility as to make the trial a "hollow formality". Nowhere was there a discussion that adverse publicity faintly infected the trial.

"In most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a *probability* that prejudice will result that it is deemed inherently lacking in due process". *Estes v. Texas, supra* at 473 (Emphasis added).

"Due process requires that an accused receive a trial . . . free from outside influences. Given the

> persuasiveness of modern communications and the difficulty of erasing prejudicial publicity from the minds of the jurors, the Trial Courts must take strong measures to insure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances . . . The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. *Sheppard v. Maxwell, supra* at 362, 363.

This Court has long recognized reality and discarded fiction. *Irvin v. Dowd*, 366 U.S. 717 (1961); *Marshall v. United States*, 360 U.S. (1959); *Brown v. Board of Education, supra; In Re Murchison*, 349 U.S. 133 (1955); *Bruton v. United States*, 391 U.S. 123 (1968); *Ham v. South Carolina*, 409 U.S. 524 (1973); *Sheppard v. Maxwell, supra.*

In this context the following observations made in 1973 by Rufus King, a Washington, D.C. attorney, is unfortunately real, factual and relevant.

> "Sweeping drug raids and mass arrests always attract special attention from information media. Moreover, enforcement authorities often put out press releases, actively seeking publicity for their feats of detection and apprehension. Thus, the problem of local prejudice against defendants in large drug cases is usually present and often acute. "Defense of a Drug Abuse Case" by Rufus King, as cited in Criminal Defense Techniques, Volumn 3, edited by Sidney Bernstein in Art. 57, P. 36 (1973).

Recognizing the problems inherent in cases like this, the American Bar Association has set forth not only minimum

standards for the dissemination of publicity, but also has included disciplinary rules with regard to same. It is contended that the problems inherent in this case are not that of first instance and have been recognized to be improper.

> ". . . there are occasions when the inherently prejudicial nature of material, coupled with knowledge of its wide dissemination in the community, requires granting of relief without elaborate soundings of community sentiment". ABA Minimum Standards, Tentative Draft, p. 126. See also *People v. Martin*, 243 N.Y.S. 2d 343 (1st Dept. 1963); *Delaney v. United States*, 199 F. 2d 107 (1st Cir. 1952); *Rideau v. Louisiana, supra.*

Certainly, the supervisory power of this court over the proper administration of the Criminal Justice System is without question, *Marshall v. United States*, 360 U.S. 310 (1959). Furthermore, this Court in *Janko v. United States*, 366 U.S. 716 reversing 281 F. 2d 156 (8 Cir. 1960) has recognized the subliminal impact on juries of even a single newspaper item. A procedure employed by the government need not be identifiably prejudicial to be abhorrent to due process for at times it involves such a probability that prejudice will result that it is deemed inherently lacking in due process, *Estes v. Texas, supra; Sheppard v. Maxwell, supra; Rideau v. Louisiana, supra.*

> "I do not believe its within the province of law enforcement officers actively to cooperate in activities which tend to make it more difficult for the achievement of impartial justice". *Rideau v. Louisiana, supra* at p. 728.

We are reminded of the following statement as related in *Mapp v. Ohio*, 367, U.S. 643 (1961):

> "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

As dissatisfied as Judge Frankel was with the "circus" together with the responses from the prosecution which appeared to be rather short and unimpressed by the great problem at hand, so were the petitioners were doubly concerned.

Purposeful and active participation in saturating the community by the prosecution must be condemned.

We are reminded of the striking statement in *Irvin v. Dowd, supra*

> "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so hugh a wave of public passion. . ." 366 U.S. 717, 728.

The entire process and scheme of publicity in this case has been totally unfair to petitioners from the beginning, through the trial and even subsequently thereafter mandate the necessary action by this Court. The Trial Court expressed its disapproval, its concern and left us with a factual situation that demands the condemnation of this prosecution.

In *United States of America v. Keogh*, 391 F. 2d 138, 148, the United States Court of Appeals for the Second Circuit stated:

> "Deliberate prosecutorial misconduct is presumably infrequent; to invalidate convictions in the few cases where this is proved, even on a fairly low showing of materiality, will have a relatively small impact on the desired finality of judgments

and will deter conduct undermining the integrity of the judicial system".

The Circuit opinion chose to exercise its supervisory power in connection with the publicity at the time of the arrest only to the extent of admonishing the Government that a recurrence of the type of publicity which occurred in this case must not be permitted. A similar warning was made in *United States v. Pfingst*, supra. There, as was done here, the Trial Court took the Government to task for its conduct in holding a press conference to announce the indictment of the defendant. The panel in *Pfingst* was of the opinion that the "form of the public announcement of the bribery indictment . . . raises . . . troublesome questions." *Id.* at 185. Significantly, *Pfingst* was decided on April 4, 1973. The events which occurred in this case occurred between April 13 and April 16, 1973. Accordingly, the Government, in the face of the Circuit Court's admonition in *Pfingst* not only continued that form of public announcement which raised troublesome questions but went one step further by publicizing in a dramatic way the pre-arrest briefings, arrest raids, arrests and arraignments of these defendants.

In 1961, Mr. Justice Frankfurter, concurring in *Irving v. Dowd, supra*, at 730 stated:

> "Not a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts—*too often, as in this case, with the prosecutor's collaboration*—exerting pressures upon potential jurors before trial, and even during the course of trial, thereby making it extremely difficult, if not

> impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court." (emphasis added)

And in 1965, Mr. Justice White, with whom Mr. Justice Brennan joined dissenting in *Estes v. Texas, supra,* at 616 stated:

> "Serious threats to constitutional rights in some instances justify a prophylactic rule dispensing with the necessity of showing specific prejudice in a particular case . . . these are instances in which there has been ample experience on which to base an informed judgment.

The Circuit has concluded in this case that "allowing members of the press to attend pre-arrest briefings of the police presents the grave danger *that undue publicity will, in advance of trial, convict the accused in the minds of the general public and seriously prejudice his right to be accorded a fair trial by an impartial jury.*" (Appendix A—Emphasis added) The time has come for this Court, on the basis of ample experience, to base an informed judgment that the actions of the Government in this case, coming so soon after a warning by the Circuit, leave no further room for cautionary pronouncements but require the fullest exercise of this Court's supervisory power and a suppression of the indictment.

VI

The evidence elicited at the suppression hearing demonstrates conclusively that the defendants' ownership of the suitcase, although checked at a railroad baggage terminal, carried with it a "reasonable expectation of privacy" and as such, conferred standing upon them to object to the warrantless search and the seizure of its

contents. The denial of standing in this case relies wholly upon a lingering belief that Fourth Amendment protections are only co-extensive with protection against trespass to property. That belief was firmly laid to rest in *Warden v. Hayden*, 387 U.S. 294 (1967):

> "the premise that property interest control the right of the Government to search and seize has been discredited. Searches and seizures may be 'unreasonable' within the Fourth Amendment even though the Government asserts a superior property interest at common law. We have recognized that the principal objection of the Fourth Amendment is the protection of privacy rather than of property, and have increasingly discarded fictional and procedural barriers resting on property concepts."

The Circuits opinion that "any continuing interest of the defendants in the $38 suitcase, itself, was negligible" evinces a disregard for privacy based on a monetary standard without consideration of the actual expectations of millions of travelling passengers who expect that their checked luggage—regardless of its cost—will remain private unless express authorization or exigent circumstaces justify the invasion of that privacy.

The Government presented no proof and the petitioners' assertion in their affidavits that they owned the suitcase and their testimony at the hearing stands without contradiction as to that fact. Delivery of the suitcase was never made—the search was conducted three days prior to anyone claiming the suitcase and significantly, Milton Julert, the baggage agent who checked the bag, testified that the man who checked it said *he* would be back to pick it up in a couple of days.

This fact, testified to by Julert *after* petitioners'

testimony, supported Guarino's testimony on cross-examination:

> Q. Whoever it was that was supposed to deliver it, the delivery man was supposed to open the suitcase, take out the contents, give to to somebody and then they were supposed to put money in the suitcase and the money was supposed to come back? Is that right or wrong?
>
> A. That's wrong. Supposed to deliver the drugs. When they got it, they were supposed to test it, see if the quantity and quality was okay. If it was, remove the drugs from the valise, put whatever the balance was back into the valise and deliver it to Mr. Ramos and he was supposed to, in time, deliver it to us.
>
> Q. With the suitcase?
>
> A. With the suitcase. That was my understanding.

The Fourth Amendment protects people, not places. *Katz v. United States*, 389 U.S. 347 (1967). In holding that the petitioners' Fourth Amendment rights had been violated by clandestine surveillance, *Katz* pronounced the following test delineating the right protected by the Fourth Amendment:

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . but what he seeks to preserve as private even in an area accessible to the public, may be constitutionally protected. *Katz, supra*, at 351-352.

What petitioner sought to preserve as private in this case was the locked suitcase. Even though that suitcase was not within their physical possession, it was locked and placed in the hands of the Penn Central Railroad for their benefit

and for no others benefit. No constricture of the Fourth Amendment can abrogate that "reasonable expectation" that the luggage, locked as it was and placed in the hands of a bailee for their benefit, would not be searched without their consent.

The delivery of a package to a common carrier as in this case does not forfeit one's right of privacy thereto. *Ex Parte Jackson,* 96 U.S. 727, 733; (See also *Stoner v. State of California,* 376 U.S. 489.) The mere surrender of custody to a carrier did not forfeit the petitioners' right to privacy since no express authorization was given to the carrier to consent to any search of the package. No evidence was elicited by testimony or otherwise that petitioners, in any way, waived their right of privacy or expressly authorized a search of the suitcase by anyone. Nor was there evidence in the record which gave the Railroad-bailor a right to open the suitcase. In fact, the evidence was clear from the testimony of the Railroad baggage agent that had the bag been lost the limit of the Railroad's liability would have merely been $25.00, (1379) and that the Railroad was required to hold the suitcase for, at least, 60 days prior to dispossing of unclaimed luggage. (1462-64).

Even the renter of a public locker is entitled to the protection of the Fourth Amendment as if he were in the privacy of his own home. *United States v. Durkin,* 335 F. Supp. 922 (D.C.N.Y. 1971).

Similarly, a package or parcel placed in the mails is protected against unreasonable search and seizure. *United States v. Van Leeuwen,* 397 U.S. 249 (1970). The circumstances presented in *Van Leeuwen* and the facts in this case are not distinguishable. In *Van Leeuwen,* this Court examined whether the opening of a package placed in the mails was reasonable or unreasonable. No question was raised whether the person who placed the package in the

mails had standing to object to the search and seizure nor could any objection be raised since the reasonable expectation of privacy gave that defendant standing to object to the search. It was irrelevant in *Van Leeuwen* that the mailed parcel was addressed to someone other than the defendant in that case since the defendant who mailed it had every reasonable expectation that the privacy of the parcel would be safeguarded. So too did petitioners in this case have every reasonable expectation that the privacy of the suitcase which they owned would be safeguarded notwithstanding the fact that the Railroad was holding it temporarily for their benefit.

The Government has taken issue against the standing of petitioners to assert Fourth Amendment rights in connection with the search and seizure of the suitcase by relying on *Brown v. United States.* 411 U.S. 223 (1973), and contends that since petitioners (a) were not on the premises at the time of the contested search and seizure, (b) had no proprietary or possessory interest in the premises, and (c) were not charged with an offense that includes as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure, no Fourth Amendment rights of the defendants were violated.

The facts as elicited at the hearing below demonstrate conclusively and without contradiction by witnesses for the Government that each of the defendants owned the suitcase at the time of the warrantless search and seizure. The facts in *Brown v. United States, supra,* reveal that the petitioner in that case, who sought standing to suppress seized evidence, had transferred possession to a third party for monetary consideration approximately two months before the challenged search which took place on the premises of the third party. Moreover, he had never alleged ownership

or possession of the seized evidence. The testimony of Capra, Guarino and Dellacava is uncontradicted that the ownership of the satchel at the time of the warrantless search and seizure was theirs and they alleged it by affidavit and testimony.

The Court in *Brown* was careful to note that the "vice of allowing the Government to allege possession as part of the charge and yet deny that it was sufficient for standing purposes, is not present", *Ibid.* at 1569, and went on to cite two cases, *United States v. Cowan*, 396 F. 2d 83, 86 (2nd Cir., 1968) and *United States v. Bozza*, 365 F. 2d 206, 223 (2nd Cir., 1966) where the vice was not present. *Cowan* held that by leaving luggage in a hotel room without paying his bill, the defendant abandoned his property by relinquishing all of his title, possesion or claim to it and the hotel's right to seize the property was supported by the laws of the State of New York in exercise of the hotel's lien to collect its unpaid bill. *Bozza* denied standing to contest a search and seizure on the grounds that the property belonged to the post office, the defendant had abandoned its possession to another, the defendant was not present at the home wherein the search and seizure were made and the defendant was not charged with an offense of possession of the gun which was seized. There is no evidence of abandonment in the record below and no evidence was presented which indicated that the Railroad had any right to search the suitcase.

Brown defined the vice as "allowing the Government to allege possession *as part of the charge* and yet deny that it was sufficient for standing purposes" (emphasis added). These words, carefully uttered, did not define the possession required for standing purposes to be the *exact possession* necessary to convict. It is only necessary that the possession sufficient for standing be possession *"as part of*

the charge." The possession of the suitcase in Toledo was central to the Government's charge of possession in New York and the Court below, therefore, charged:

> "Specifically to speak in terms of what the Government contends and what you may find to have been proved or not proved, the contention is that the transportation of the 5½ kilos of heroin to Toledo, Ohio, as charged in the fourth count, was allegedly done pursuant to the direction or with the participation of Capra, Guarino, Dellacava and Jermain. If you find that kind of direction and control . . . this would satisfy the requirement of possession within the meaning of the statute (3926).

It is, therefore, clear that "part of the charge" against these petitioners was their dominion and control over *the suitcase* and its contents in Toledo.[35]

Moreover, the entire import of the Government's questions put to these petitioners while they were on the stand asserting their constitutional rights, was to develop evidence to contradict the defendants' assertion of ownership in the seized property. The vice recognized in *Brown* was confirmed at the hearing and this Court should not allow the Government to conduct a tongue in cheek cross-examination for the purpose of denying possession in a standing hearing and, thereafter, to conduct a direct examination of witnesses at the trial in an attempt to prove the same or connected possession against these petitioners.

Thus, at trial, the prosecutor was relying on, and the Court so charged, petitioners' control over the delivery and

35. Although constructive possession was sufficient to convict, it was held in *Brown* not to be sufficient to confer standing. However, the possession at the time of the search in *Brown*, was not used to support the possession charged in the indictment in any way.

deposit in Toledo, ie. possession in Toledo, and membership in a conspiracy that embraced both the New York and Toledo possessions separated by a matter of days, as the evidence sufficient for conviction on the substantive counts of possession in New York. Toledo possession, central to the Government's case for conviction, was, nevertheless, denied by the Government and the Court below when petitioners asserted their Fourth Amendment rights.

This method of prosecution "is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government." *Jones v. United States*, 262 U.S. 251, 263-264.

As to the Court's reliance on trial testimony to deny the motion to suppress, the Third Circuit has recently said,

> The defendant's contend the suppression hearing and determination during trial could not have resulted in a fair determination on their pre-trial motions to suppress. We think the rulings on these motions could and should have been made before evidence was taken. However, we believe the error was harmless because all the evidence challenged in the defendant's motions was properly admissible. We are unwilling to assume that the Court's determination was influenced by the posture of the case at the time he ruled. We emphasize that a pre-trial determination avoids the creation of such an impression and should be the general rule absent unusual circumstances. *United States v. Weinberg*, 478 F. 2d 1351, 1354 (1973).

Here, the Courts below specifically used the "up front" testimony that came only from the trial.

The failure of the Government to produce Joaquin Ramos as a witness concerning the issue of standing also compels the inference that his testimony would be unfavorable to the Government's position on the standing issue and that inference taken together with the direct testimony of the petitioners, left the Court no ground for denying the petitioners standing to suppress the evidence in the possession of the Government which was seized in Toledo without a warrant. Trial counsel could hardly have been expected to question Ramos at the trial about the admitted partnership between him and the defendants. Yet, his testimony was, nonetheless, used by the Courts below to unfairly buttress and decide the issue against the defendants.

Since, therefore, (1) the defendants Guarino, Capra and Dellacava asserted ownership of the suitcase at the time of the search; (2) their ownership was never contradicted or impeached at the hearing; (3) the Government alleged the Toledo possession as part of the charge of Conspiracy (Count I) and possession in New York (Counts IV and V), the defendants were aggrieved persons entitled to move to suppress the evidence seized in Toledo and all other evidence resulting therefrom.

Furthermore, to the extent that the Court's opinion below is based on narrowly defined property interests as determinative of Fourth Amendment rights, they have been rejected. *Warden v. Hayden, supra.* No interest in the effective administration of law enforcement is obstructed by recognizing appellants' real expectations with regard to the property seized in this case, and "to bow to (subtle distinctions, developed and refined by the common law in evolving the body of private property law) in the fair administration of the criminal law . . . would not comport with our justly proud cliam of the procedural protections

accorded to those charged with crime." *Jones v. United States*, 262 U.S. *supra* at 266-267.

The search of the suitcase came only after its existence came to the attention of Albert Blevins, Captain of Police for the Penn Central Railroad in Toledo, on Wednesday, October 27, 1971 (1419). Blevins was in charge of nine officers assigned to the Toledo division of the Penn Central Railroad Police whose duty it was to protect the railroad property and to conduct investigations connected with it (1386). He was commissioned by the State of Ohio (1396, 1416), had the right to arrest people (1417), investigated crimes on railroad property (1417), and carried a badge with the seal of the State of Ohio on it. (1419). He learned of the suitcase from Charles Sibold, a Penn Central baggage clerk, who told him that it had been checked under suspicious circumstances (1386). It was explained to Blevins that the suitcase which had been checked on October 20, 1971 was supposed to have been picked up in a day or two by the man who had checked it (1387). Sibold communicated his concern to Blevins that the bag "possibly could contain explosives."[36] Blevins, agreed with Sibold that the circumstances were suspicious, and unsuccessfully attempted to open the bag with him. Sibold then asked Blevins to get assistance in unlocking the suitcase (1388-89, 1398). Blevins called his primary contact in the Toledo Police Department, Detective George Ryan, for aid in opening the suitcase (1390). Blevins told Ryan that he believed the suitcase might contain "the makings of a bomb." Blevins' belief and curiosity concerning the contents of the bag were based both upon what Sibold told him and a similar experience which he had had in

36. This concern was based on Sibolds' feeling that the suitcase was heavy and did not seem to contain clothes because it "swished" when shook (1435-37).

Cleveland as a railroad policeman where a bag which had been checked, contained bomb materials (1401, 1417). On the next day, October 28, *Blevins directed Sibold that if someone came to pick up the suitcase, he was to get a description of the man's physical appearance, request him to sign the back of the check to obtain a handwriting sample and attempt to take the license plate number of his car* (1455-56). Later that day, Detective George Ryan arrived at the Toledo Railroad Terminal with two other Toledo Police officers, Bedal and Beavers, to "assist a fellow officer" (1486-87) and was brought by Captain Blevins to the baggage area where the suitcase was being held (1482-83). Blevins, the three Toledo police officers and Sibold went to a rear area of the baggage room where Blevins supplied paper clips for the purpose of opening the locks (1483, 1505). The lock was sprung by the Toledo police. Sibold was told by the Toledo police to open the bag and after doing so, officer Beavers reached into the bag, picked up a plastic bag, opened it and then showed its contents to Ryan (1497, 1499).

Captain Blevins was, at the time of the search and seizure, commissioned in Ohio to possess and to exercise "the powers of and (to) be subject to the liability of municipal policemen while discharging the duties for which they are appointed." Ohio Revised Code 4937.19 Railroad companies, pursuant to Ohio Revised Code 4937.19, are authorized to pass rules and regulations which have the effect of State law on the company property and the railroad police are authorized to make arrests for violations of such rules and regulations in addition to being empowered to arrest for the violation of other State law on the property of the company. Moreover, that section requires jailers in Ohio to accept as prisoners persons arrested by railroad police.

As a police officer commissioned by the State of Ohio, the search which was participated in and directed by Captain Blevins was the search of a Governmental agent. The Supreme Court of Ohio in the *New York, Chicago and St. Louis Railroad Company v. Fieback*, 87 Ohio 254 (1912) held

> "a policeman who is appointed and commissioned by the Governor, under Section 3427 and 3428, revised statute (Ohio revised code section 4937.17-18) is a public officer, deriving his authority from the State."

United States v. Belcher, 448 F. 2d 494 (7th Cir., 1971), directly held that the conduct of railroad policemen was governmental action. The Government in Belcher contended, as it does here, that the conduct of the railroad security men was not "governmental action" and, thus, the Fourth Amendment was inapplicable. The Court held:

> "We cannot accept this contention. The men in question both indicated they were railroad policemen, that they carried guns and had the power to arrest. It seems clear they had authority as police officers under the Illinois Statutes, Ill. Rev. Stat. Ch. 114, Section 98 (1969). *United States v. Belcher, supra* at 497.

The defendant in *Belcher* was the driver of a truck owned by his employer which was on railroad property for the purpose of taking deliveries only of merchandise for which he had freight bills. The railroad police searched the trunk and the evidence found was introduced at Belcher's trial. The Court applied the full strictures of the Fourth Amendment to the railroad policemen despite the fact that the merchandise seized was in the hands of a common carrier, which had the duty of seeing that the merchandise was delivered to the consignees and despite the Court

expressed opinion that there should be, perhaps, some privilege on the part of the carrier while the truck was still on its premises to see by inspection that incorrect merchandise had not been loaded.

Lustig v. United States, 338 U.S. 74 (1949), is dispositive of when a search must be considered a police search. In *Lustig*, State police officers were in the process of conducting a search which would not have been admissible in a Federal case had the same search been conducted by Federal agents. During the search, the Federal agents were called by State police officers to come to the hotel where the search was being conducted. This Court noted specifically that the Federal agents did not request the search and were not the moving force behind it and neither was the search by local police being done to aid the enforcement of any Federal law but, in fact, was being conducted by local police officers solely for local purposes.

Since *Lustig* arose prior to *Mapp v. Ohio*, 367 U.S. 637 (1961), at a time when *Wolf v. Colorado*, 338 U.S. 25 (1949) was the established rule, a search by a State police officer was as constitutionally insignificant as a search by a private person. The Government in *Lustig*, therefore, sought to uphold the introduction of the evidence which had been seized by local police officers arguing as the Government does here that there is a constitutionally significant difference between an agent conducting the search and the search being conducted in his presence. The Court answered saying at 338 U.S. 78

> "to differentiate between participation in the beginning . . . and joining it before it had run its course, would be to draw too fine a line in the application of the prohibition of the Fourth Amendment . . .".

The test, therefore, pronounced in *Lustig* and heretofore never overruled or changed is whther an officer participated in the search before its end purpose was accomplished.[37] This Court said:

> "it is immaterial whether a Federal agent originated in the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it." (at p. 79)

It is, therefore, immaterial whether the railroad employees' conduct was consonant with their employer's duties and rights either as a non-gratuitous bailee or as a common carrier; for the railroad, had hired and employed Captain Blevins as a policeman empowered by the legislature of Ohio with full police powers to protect its property against "even modest, if not chimerical, dangers of explosions or other kinds of destruction."[38] The rules and regulations of the railroad under which Captain Blevins acted had the force of State law and his actions which the trial Court found to be consonant with those rules and regulations, were, therefore, official action sanctioned by the State of Ohio. It may be, although petitioners do not concede it, that the presence of Toledo police officers was only for the purpose of "precautionary assistance." Nevertheless, as the District Court found,

37. Although the "silver platter" doctrine was rejected in *Elkins v. United States*, 346 U.S. 206 (1960), the doctrine of *Burdeau v. McDowell*, 256 U.S. 465 (1921) was not affected or impaired by *Elkins* or *Rea v. United States*, 350 U.S. 214 (1956). See also *United States v. Goldberg*, 330 F.2d 30 (3rd Cir., 1964);, *United States v. Maguire*, 381 F.2d 306, nl. 5 (2nd Cir., 1967). *Lustig, supra*, therefore expresses this Court's ruling in connection with what constitutes constitutionally significant participation of public officers.

38. See Appendix E.

"their presence was primarily service to those who had enlisted their aid" and the one who had enlisted their aid was a "fellow-officer", — railroad policeman, Captain Blevins. Captain Blevins, curious about the bag and its contents, took control of the situation and acted as an investigating police officer when he directed Sibold to get the physical description, handwriting and license plate number of anyone who picked up the bag. He called Toledo Police officers to help him open the bag and he participated in the actual unlocking of the case.

Nothing cited by the Court below supports the conclusion that the search conducted in Toledo was a "private search." The authorities cited to establish a "private" search are inapposite.

In *United States v. Cangiano*, 464 F. 2d 320 (2nd Cir., 1972), the agents were not present when the packages were opened by civilian employees; *United States v. De Berry*, 487 F. 2d 448 (2nd Cir., 1973), concerned a search by a civilian employee of an air freight service whose contract with the shipper provided that the shipper consented to the inspection of his goods; *United States v. Blum*, 329 F. 2d 49 (2nd Cir., 1964) also turned on the fact that the carrier which had possession of the package had reserved the right to open packages under contract; and *Wolf-Low v. United States*, 391 F. 2d 61 (9th Cir., 1968), assumed the fact, contested in this case, that the carrier had the right to open the suitcase. *United States v. Antonelli*, 434 F. 2d 335 (2nd Cir., 1970) concluded only that a private detective agency is not a governmental authority.

Corngold v. United States, 367 F. 2d 1 (9th Cir., 1966) concluded that the appellant therein, when he left packages with TWA in Los Angeles

"did not abandon his package; and mere surrender of custody to a carrier did not forfeit appellant's right to privacy." Id. at 7.

The request for assistance made by Sibold was not made to his civilian superior but to Captain Blevins who directed the Toledo Police to the baggage room and instructed Sibold to obtain the name, physical description, handwriting sample and license plate number of anyone who came to claim the suitcase.

The investigatory directions of Blevins, seeking to prevent either a violation of State law or to enforce Railroad regulations which had the full force and effect of State law (Ohio Revised Code 4937.19), clearly distinguish the facts herein from the non-investigatory actions sanctioned by this Court in *Cady v. Dombrowski,* supra. Neither is *Cady* applicable herein on the grounds of "exigent circumstances." The suspicion that there were "bomb makings" was based on totally innocuous circumstances. In fact, Julert, who had fleeting thoughts about a bomb, dismissed them immediately. (1334, 1346). Julert's one concern was that the bag should be safe which clearly gave no reason for a search. (1337). Sibold based his suspicion on Julert's fleeting thought of a bomb and a swishing sound he heard when he shook the suitcase. (1435-36).

In spite of Julert's fleeting suspicion about a bomb, Sibold's similar suspicion and Blevins' experience in Cleveland, they did not do anything until October 27, seven days after the bag was checked at which time Sibold first spoke to Blevins (1438-39). No precautions were taken as if there was a possibility of a bomb. In fact the trial Court instead found that all of their concerns were "modest, if

not chimercial"[39], certainly not the concern of the officer in *Cady* who "reasonably believed (the trunk of an automobile) to contain a gun". Id. at 448.

Thus, the warrantless search of defendant's suitcase, directed and participated in by a commissioned police officer of the State of Ohio, was a search made without probable cause and under chimerical circumstance which could not support a reasonable belief of danger or other exigent circumstances. Accordingly, the evidence seized as a result of that search and all of the evidence resulting therefrom should have been suppressed.

VII

At the beginning of his testimony, the major Government witness, Joaquin Ramos, related conversations between himself and Marco Delgado concerning Ramos' re-entry into the narcotics business in 1969, after a prison term. These conversations took place at the inception of the conspiracy as charged in the indictment. Notwithstanding objection to the hearsay and a request that the jury be instructed on the limits of their consideration of these conversations against any defendant, pending other evidence of the existence of the conspiracy and the defendant's membership therein, the Court overruled the objection and denied the request. "No. I will give an instruction if and when it is necessary." (143, 142-143). Ramos continued to testify to out-of-court conversations between himself and other alleged conspirators; other

39. Chimerical as defined in *Webster's New Universal Dictionary, Unabridged*, 2d ed. is:

> 1. imaginary; fanciful; fantastic; wildly or vainly conceived; that has or can have no existence except in the imagination; . . .
> 2. absurd; impossible.
> 3. indulging in unrealistic fantasies; visionary."

witnesses related hearsay conversations, and the objection was reiterated and overruled and no limiting instructions were given.[40] The Court also repeated its intention to instruct the jury only after all the evidence was in. (304, 313-316, 2239, 2243-45, 2308).

This failure of the Court below to give the limiting instructions at the time of the receipt of objectional hearsay evidence, has been held, ever since Judge Hand's opinion in *Nash v. United States*, 54 F. 2d 1006 (2nd Cir., 1932), to be reversible error. The difficulties in making the necessary distinctions among the individual defendants in a multi-defendant conspiracy trial, the complexity of the rules of evidence directing what evidence is applied against which defendant, require that the jury be constantly reminded that the hearsay does not "bootstrap" the prerequisite foundation evidence for the consideration of the hearsay itself. *United States v. Appollo*, 476 F. 2d 156, 163 (5th Cir., 1973). The instruction must be given when it is first requested, and, if not, a final charge at the end of the case comes too late. This rule of law, enshrined by this Court in *Lutwak v. United States*, 344 U.S. 604 (1953)[41], imposes a minimum obligation on the trial court (*United States v. Appollo, supra*), and in this case, "the lack of a particularized and repetitive instruction upon the subject was

40. Those conversations included Harris, Jermain and Ramos about a gift of automobile from Harris to Jermain and Ramos and money owing from Harris (266-268); Morris, Jermain and Ramos in Miami in February, 1971 (304, 313-316); Sperling to Capra about a "load" (335, 336, 345); Guarino and Capra about starting Sperling in the business (470-471); and the entire Joseph Conforti testimony about conversations with Caruso and Sperling (2389-2394, 2413-2419, 2651-2653); the Capra-Guarino conversation that Dellacava handled the goods (835, 980-985).

41. "These declarations must be carefully and clearly limited by the Court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them." 344 U.S. at 619.

error vitiating the conviction of all." *Green v. United States*, 386 F. 2d 953, 957 (10th Cir., 1967).

Closely related to this error, which in itself requires reversal of the conviction, is the failure of the Court to give continuing instructions that acts of others committed in furtherance of separate conspiracies, or acts committed outside the single conspiracy as charged in the indictment, could not be considered against the defendants on trial, and that a particular defendant's participation in the conspiracy as charged was to be determined by his own acts and words. *United States v. Russano*, 257 F.2d 712 (2nd Cir., 1958); *Kotteakos v. United States*, 328 U.S. 750 (1946). The reason behind the rule requiring repeated instruction on the limited consideration of conversations, requires the same when acts of others are to be put before the jury in a multi-defendant conspiracy case. The jury must understand, while the trial is proceeding, that they should be making distinctions among the evidence to be considered against the several and individual defendants. When they do not understand that, as the evidence is being received, a final charge at the end, after they have been considering everything against everybody in the case, does not sufficiently equip them to do the impossible sifting job all at once. Although the physical acts are not objectionable as hearsay,[42] their application to any particular defendant is nonetheless limited, and the instruction is required.

". . . the acts of others not involving the defendant directly may come in against him merely to show

42. The hearsay, on the other hand, is admissable when it is found to be an *act* in furtherance of the conspiracy. "The declarations of one party to a concerted mutual venture are admitted against the rest on the notion that they are acts in its execution." *United States v. Renda*, 56 F.2d 601, 602 (2nd Cir., 1932).

> the existence of a conspiracy, with which he is to be linked by quite separate proof. *United States v. Costello*, 352 F.2d 848 (2nd Cir., 1965)."

Throughout this trial, as with the hearsay declarations, objections were made to the admission of separate acts outside the ambit of the single conspiracy as charged, and to acts unconnected to particular defendants. These objections were overruled throughout the trial and the judge refused limiting instructions.[43] He had stated his intention to see how it all looked at the end of the case (304, 313-316, 2239, 2243-45, 2308), and to give instructions "if and when it is necessary." (143).

The Court disregarded the necessity for instructions prior to the final charge, and if a final charge, correct on the law, would have been insufficient to cure the error (*United States v. Appollo, supra*), the Court's final charge, incorrect on the law, could not do so. The Court finally charged:

> I have told you in a fairly standard legal conception that in a sense, one conspirator, one member of a conspiracy, is said to be the agent of every other member. One of the things that follows from this is that *if a jury finds from a preponderance of the independent evidence* as to each individual alleged member, that people I shall call for the moment A, B and C are all members of a conspiracy, then the acts or declarations of A, even in the absence of B and C, may be taken as evidence against B and C.

43. These objections came at the close of the Government's opening statement (25-27); the Jermain, Ramos, Morris meeting in Miami in February 1971 (304, 313-316); the Capra-Sperling visit and "load" conversation (335-336, 345); the Capra-Guarino conversation about Sperling (470-471); the December, 1970 arrest of Simms and the receipt of the heroin seized from him (1803-1805); Conforti's testimony about the Sperling conspiracy (2389-2394), 2413-2419, 2651-2653); the tracings from the Bar Harbor hotel (2888-2894).

provided that those acts or declarations occur during the conspiracy and in furtherance of it. (3942) (emphasis added).

Objection was taken to this misdirection to the jury to apply the preponderance standard, the standard the judge applies to determine threshold admissability The preponderance test of admissability was not designed to alter the jury's application of the standard of beyond a reasonable doubt in determining ultimate questions of guilt or innocence. *United States v. Geaney*, 417 F.2d 1116 (2nd Cir., 1964); *United States v. Cantone*, 426 F.2d 962 (2nd Cir., 1970) cert. den. 400 U.S. 827. This objection was overruled, and the erroneous charge stood through the jury's deliberations, until near the end of the deliberations when they asked whether a defendant could be found guilty of the conspiracy even if he had not committed an overt act. At that time, the Court charged they would first have to find the defendant to be a member of the conspiracy beyond a reasonable doubt (4081). The jury was never told to disregard the previous, incorrect standard given to them in the judge's main charge, and their verdict, which obviously turned, in their minds, on this issue, should not be permitted to rest on ambiguous, equivocal, or contradictory instructions. *Bollenboch v. United States*, 326 U.S. 607 (1946); *United States v. Christman*, 209 F.2d 651 (2nd Cir., 1962); *Gagliardo v. United States*, 366 F.2d 720 (9th Cir., 1966).

We submit further that "the jury could not possibly have found, upon the evidence, that there was only one conspiracy." *Kotteakos v. United States, supra*, at 768; *United States v. Russano, supra*. The Government's evidence showed at least one separate conspiracy involving Joseph Conforti, Herbert Sperling and John Caruso. Conforti's testimony concerning his narcotics mixing activities for

Sperling in a Long Island hotel in March and April, 1973, included no evidence to link petitioners with any of these men or their activities. This was a separate criminal enterprise, the evidence of which made no mention of Dellacova an only by association as to Capra and Guarino and described events in March, 1973, one year after the last alleged conspiratorial acts of Dellacava in February, 1972. ••The prejudicial variance arising out of these events erroneously admitted against petitioners is stronger than it was in *Rossano, supra,* because here, not only is there a time hiatus, but the actors are different.

> If appellants had been tried only for the 1952 conspiracy, the admission of evidence relating to the later conspiracy of 1955-1956 would have constituted prejudicial error. Similarly, if they had been tried for the later conspiracy, evidence of earlier illegal acts would have been seriously prejudicial. *United States v. Russano, supra* at 715.

In thise case, as in *Kotteakos* and *Russano,* petitioners were deprived of a fair trial, because the danger of "transference of guilt" between the separate conspiracies, as proved, was so great.

And, petitioner Delacava was further prejudiced by the introduction against him of an uncharged isolated act of possession of heroin tracings, an act of possession in April, 1973, when the only other evidence linking him to any conspiracy ended in February, 1972. Although prior or

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44. The Court seemed to believe this evidence was admissable against Dellacava because he was arrested in April, 1973, and tracings were found in the gym bag (3492-3541), but this act was isolated from any connection to the Conforti-Sperling conspiracy; there was no evidence of connection or association, nor was there evidence that it was linked to the events prior to February, 1972.

subsequent uncharged criminal acts may be admissable to prove motive, intent, or design if those acts are closely connected in time with the conspiracy, in this case petitioner did not take the stand and those issues were not present in the case; dust had no probative value to the charges on trial (*Diaz-Rosendo v. United States*, 364 F.2d 941 (9th Cir., 1966), and the subsequent act occurred one year after the last supposed conspiratorial acts shown by the other evidence; *United States v. Russano, supra; United States v. Marchiso*, 344 F.2d 653, 664 (2nd Cir., 1965).

Should this Court find as in *United States v. Borelli*, 336 F.2d 376 (2nd Cir., 1964), that the jury could have found a single conspiracy, a reversal is still mandated, as it was in *Borelli*, because the charge to the jury did not focus attention on the scope of petitioners' particular involvement in it. Since the evidence was, at the least, ambigious as to petitioners' involvement in the Conforti-Sperling business, the failure of the Court to specifically charge their exclusion, as requested, or to specifically apprise the jury of the task to determine their involvement or non-involvement in the entire overall scheme as charged in the indictment, required reversal of the conviction. The danger of "over-extension of a legal doctrine" of conspiracy, noticed in *Borelli, supra*, and *United States v. Kelly*, 349 F.2d 720 (2nd Cir., 1965), was not avoided in this case, because the Court's general charge that,

> if the Government has not established such a conspiracy but has established only a variety of different and unconnected conspiracies among different people, there would be a failure of proof as to element one under count one, and you would have to acquit on that count (3934),

did not specify the evidence against each defendant and

whether his membership in the entire overall scheme had been proved. The jury was not made to understand that any defendant whose membership in the overall scheme was not proved, notwithstanding proof against him of membership in some separate agreement, and notwithstanding proof against any other defendant of membership in the overall scheme, must be acquitted. They were permitted, under the charge as given, to render an all or nothing verdict as to all the defendants; since they did that, the conviction must be reversed.

VIII

During his examination of Detective Eaton about the seizure of money from Dellacava's automobile in February, 1972, the prosecutor asked, and received, an affirmative answer, "Has this currency been handed over to the Internal Revenue Service?" (2228). Then the detective admitted he had no personal knowledge about what was done with the money; the Court sustained objection, realized the testimony was hearsay, but refused to strike it or instruct the jury (2229-2230).

During his examination of Herbert Sperling, called as a defense witness, the prosecutor asked, "Were you indicted (in 1959) for violation of the Federal narcotic laws . . . Did Count 17 charge that the defendants, Joseph Valachi, Ralph Wagner, Herbert Sperling and . . . ." (3330-3331). Objection was sustained and the Court instructed, "disregard the list of names." (3332).

The Government had called Milton Julert, who was one of the witnesses who identified Ramos as the man who delivered the suitcase to the Toledo Railroad Station, and as with all these witnesses, the Government attempted to suggest that he had picked the wrong man. This was important to the credibility of Ramos, the Government's

major witness, who denied making the delivery to Toledo and claimed he was wrongly convicted in Ohio. When they failed to shake Julert, the Government excused him but later recalled him to have him testify that at one time he picked out a photograph of another man. The Court precluded this line of questioning on recall, because "there is the aura of pressure here on him, and there is the lack of any excuse for not having made this kind of test . . . to show that he can misidentify earlier." Immediatrly after this ruling from the Court, the prosecutor asked, in open court,

> Mr. Julert, have you had a recent experience in which you have misidentified . . . (2957)

Objection was sustained; there were no instructions to the jury, because, the Court said, "The jury knows that a question is not evidence." (2958).

The Government elicited the following testimony from Joaquin Ramos, over objection:

> Q. Did ou ever have any conversations with Steven Dellacava as to what was contained in those brown bags?
>
> A. Yes.
>
> Q. What was in that?
>
> A. Junk. (988).

Objection was overruled.

Each of the above occasions injected irrelevant and inflammatory misinformation into the trial, and the jury's hearing of it intolerably tainted this trial. In the first instance above, the prosecutor was clearly suggesting other crimes in his leading question about the turning of the money over to the Internal Revenue Service, and it was only a leading suggestion because Eaton had no direct knowledge. *Thurman v. United States*, 316 F.2d 205 (9th

Cir., 1963); *Ross v. United States*, 180 F.2d 160 (6th Cir., 1950); *United States v. James*, 208 F.2d 124 (2nd Cir., 1953). The Court's refusal to strike, compounded the prejudice. In the second instance, the prosecutor once again suggested an inflammatory association within the confines of his question, was Sperling indicted with Joseph Valachi. This question, and the chemists blurting out of "The French Connection" on his redirect examination (243), were both fatal to a fair trial. The jury was told what league in which to put this case. *United Stayes v. Bugros*, 304 F.2d 177 (2nd Cir., 1962).

After the Governnment was specifically directed by the Court not to examine Julert on recall about prior misidentification, the prosecutor once again gave his own testimony by asking the question containing the answer, "have you had a recent experience in which you have misidentified." Objection was sustained, but the jury, without instruction to strike, got the message. As in the above instances, such bad faith acts on the part of the Government have been cause for reversal even when they are single instances in a trial. 'Garris v. United States, 390 F.2d 862 (D.C. Cir., 1968); *United States v. Simmons*, 414 F.2d 800 (9th Cir., 1969).

A conversation with Dellacava about what was in the packages was elicited, and without any testimony about the circumstances of the conversation, time, place, actual content, Ramos was permitted to testify, not to the conversation, but that "junk" was in those packages. This left an impression that petitioner had made a direct admission that he knew heroin was in the packages, the only such admission in the case. This was not Ramos' testimony, however, nor could it have been, since he obviously did not remember a specific conversation.

. . . when a witness testifies in terms of conclusions such as

'he agreed' or 'they agreed' or 'he made admissions', such answers should be stricken and the witness should be required to state what was actually said. The conclusion or interpretation of a witness as to the meaning of what someone said is not admissable. *DeLoach v. United States*, 307 F.2d 653, 655 (D.C. Cir., 1962) (Burger, J.)

See also *United States v. Kahn*, 472 F.2d 272, 279-280 (2nd Cir., 1973); *Barnes v. Tenin*, 429 F.2d 117 (2nd Cir., 1970); *United States v. Lewis*, 406 F.2d 486, 493 (7th Cir., 1969), cert. den. 394 U.S. 1013. Each of the above obviously prejudicial questions and references requires reversal and certainly together they deprived petitioners of a fair trial on the issue of guilt of the crimes charged.

Finally, petitioner Dellacava preserves objection to the introduction of testimony about the dust tracings which the Government consumed in its analysis. Petitioner was deprived of his right to present a defense and to cross-examine; (cf. *United States v. Grayson*, 166 F.2d 863 (2nd Cir., 1948) (Hand, J.); the quantity was too small to permit an inference of possession with intention to distribute (*Turner v. United States*, 396 U.S. 398, 423 (1970); *United States v. Vallejo*, 312 F. Supp. 244 (D.C.N.Y.) aff'd. 438 F.2d 663; *Diaz-Rosendo v. United States*, 364 F.2d 941, 944 (9th Cir., 1966)), and the inference from the chemist's testimony that particles of dust from other heroin samples in the laboratory and in the DEA office safe could have settled on the bag and his further testimony that he consumed the entire amount of dust, because he wished to ensure the finding of some traces, renders the tracings unconnected to petitioner and indicates direct Government preclusion of defense access for the purpose of Government proof. *United States v. One 1966 Chevrolet Sedan*, 14 Cr. L. 2387, 2389 (D.C.S. Fla., decided January 16, 1974); *People v. Pippin*, 16 A.D. 2nd 635 (1st Dept., 1962).

CONCLUSION

FOR THE ABOVE STATED REASONS, A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENTS AND ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Respectfully submitted,

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SUPREME COURT, U. S.

NOV 26 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 74-659

OCTOBER TERM 1974

UNITED STATES OF AMERICA,

Respondent,

-against-

JOHN CAPRA, LEOLUCA GUARINO and STEPHEN DELLACAVA,

Petitioners.

JOINT APPENDIX

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APPENDIX A

ORDER AND DECISION OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 998, 1022, 1044, 1060, 1061 and 1062
September Term, 1973.

(Argued May 9, 1974 Decided July 26, 1974)
Docket Nos. 74-1068, 74-1037,
74-1140, 74-1143, 74-1144 and 74-1148

UNITED STATES OF AMERICA

Appellee,

v.

JOHN CAPRA, GEORGE HARRIS, ALAN MORRIS, LEOLUCA GUARINO, STEPHEN DELLACAVA and ROBERT JERMAIN,

Defendants-Appellants.

Before:

ANDERSON, FEINBERG and MANSFIELD,

Circuit Judges.

Appeals by six defendants from jddgments of conviction, following jury verdicts of guilty, on one count of conspiracy to violate the narcotics laws, 21 U.S.C. §846 and 26 U.S.C. §7237(b); and by four defendants on four counts charging the substantive offenses arising under 26 U.S.C. §§4705(a), §7237(b), 21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(A), in the United States District Court for the Southern District of New York, Frankel, *Judge.*

Judgments reversed on the conspiracy count as to Capra, Guarino and Della Cava and judgments affirmed on the conspiracy count as to Harris, Morris and Jermain; judgments affirmed on the substantive counts.

BARRY IVAN SLOTNICK, Esq., New York, N.Y., *for John Capra.*

(DAVID BLACKSTONE, ESQ., New York, N.Y. *for George Harris.*)

(JOSEPH I. STONE, Esq., New York, N.Y., *for Alan Morris.*)

GEORGE L. SANTANGELO, Esq., New York, N.Y., *for Leoluca Guarino.*

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LEONARD J. LEVENSON, Esq., New York, N.Y., *for Robert Jermain.*

LAWRENCE S. FELD, Assistant U.S. Attorney, Southern District of New York (Paul J. Curran, U.S.

Attorney, Gerald A. Feffer, George E. Wilson, Daniel Beller, S. Andrew Schaffer and John D. Gordan, III, Assistant U.S. Attorneys, Southern District of New York, on the brief, *for United States of America.*

ANDERSON, *Circuit Judge:*

The indictment in this case charges these defendants-appellants, John Capra, Leoluca Guarino, Stephen DellaCava, Robert Jermain, Alan Morris and George Harris in five counts with violations of the narcotics laws. Count One alleges that all of the defendants conspired to violate the narcotics laws in violation of 26 U.S.C. §7237(b) and 21 U.S.C. §846. Counts Two and Three charge Capra, Guarino, DellaCava and Jermain with selling two kilograms of heroin in August, 1970, and one kilogram of heroin on November 6, 1970, respectively, not in pursuance of a written order in violation of 26 U.S.C. §§4705(a) and 7237(b). Count Two relates to one of several sales to Morris, discussed infra, by Capra, Guarino, DellaCava and Jermain, and Count Three concerns one of a series of sales to Harris by these same defendants. *Count Four charges Capra, Guarino, DellaCava and Jermain with distributing, and possessing with intent to distribute, five and one-half kilograms of heroin in October, 1971, in violation of 21* U.S.C. §§812,841(a)(1) and 841(b)(1)(A); and Count Five charges them with the same offense on that date with regard to one kilogram of cocaine.[1] These counts relate to the Toledo station delivery, discussed infra. The jury found each of the defendants guilty as charged and a judgment of conviction was entered on each of the verdicts.

There was evidence from which the jury could have

found that the defendants Capra, Guarino and DellaCava had formed a New York cnetered enterprise for the massive marketing of heroin and cocaine in which their functions were loosely but generally divided in this way: Guarino secured the drugs from importers; Capra acted as distributor; and DellaCava made the deliveries.

Later Joaquin Ramos (an admitted co-conspirator but not a defendant) and Jermain transferred drugs from DellaCava in New York to Morris and Harris for sale in the Midwest. Ramos had served 17 years in federal prisons for narcotics violations and after his release in 1969, immediately began to frequent the Havemeyer Social Club in the Bronx, at the (invitation of its "proprietors", Capra, Guarino and DellaCava.) The Club was one of the fronts for the enterprise. Guarino offered to reestablish Ramos in the narcotics business, and while the latter considered the proposition, he helped count and secret away money which DellaCava brought into the Club.

By the fall of 1969 Ramos and a partner were distributing a kilo of heroin each month. His usual routine was to place orders with Guarino or Capra at the Club and leave a car there, with a full tank of gasoline, so that DellaCava could pick up the drugs and, after driving around the City to insure that he was not being watched, return, leaving the narcotics in the trunk of the car for distribution by Ramos.

Jermain, whose major customer was Harris, a Detroit drug dealer, entered into a partnership with Ramos in March, 1970. On instructions from Capra, they developed a pattern of dealing in which Harris paid for the narcotics with "front money," i.e. payment in advance, and Ramos or Jermain delivered the drugs to him or one of his agents. Later in 1970, Ramos and Jermain established an additional outlet with another Midwestern dealer, Alan

Morris, who by 1971 was placing orders every three or four months for approximately $150,000 worth of heroin. As their business expanded, they not only demanded "front money" from Morris, but also refused to meet with him in New York City. Instead, Ramos or Jermain checked the packages of narcotics in public terminals and then forwarded the claim checks to Morris, who picked up the drugs without ever meeting the distributors face-to-face.

The growth of the enterprise, as outlined by Ramos and corroborating witnesses, was further described by federal and state narcotics agents who engaged in prolonged and intensive surveillance of these defendants.

In their several appeals the defendants-appellants launch their principal attacks upon their convictions by arguing that the trial court's denials of their pre-trial suppression motions, relating to the admission of evidence of certain instances or episodes of joint criminal activities by them, were error and call for reversal. These occurrences, hereinafter more particularly described, were the Toledo railroad station delivery, the wiretap at Diane's Bar, and the discovery of heroin traces and other evidence taken from DellaCava's car on April 14, 1973. The appellants further claim that improper press coverage at the time of their arrests also requires reversal of all the judgments of convic.ions. These issues will be discussed seriatim.

I. The Toledo Railroad Station Delivery

In the summer of 1971, Morris placed a large order with Ramos for heroin and cocaine, for which he delivered payment of approximately $150,000 "front money" in New York City in September. During a meeting with Capra at the Lake Isle Country Club in Westchester, New York,

Ramos put this cash in the trunk of Capra's 1972 Lincoln Continental.

Capra, Guarino, DellaCava, Jermain and Ramos decided that delivery of the narcotics should be at the baggage room of the Toledo railroad station, and on October 20, 1971, at 11:13 a.m., shortly after the arrival of the daily train from New York, Ramos checked a dark Samsonite suitcase containing the drugs with the Toledo baggage agent.

Because of what he believed to be suspicious circumstances concerning the baggage check, including Ramos' appearance and attitude, as well as the fact that luggage was normally left in lockers and not in the baggage room, the baggage agent feared the suitcase might contain a bomb particularly after it remained unclaimed for over a week. On October 28, one of the agents, with the assistance of the Toledo police, opened the suitcase and discovered the 5½ kilos of heroin and the 1 kilo of cocaine.

Willie Middlebrook, an unindicted co-conspirator, presented the claim check on October 30, at 8:50 a.m. and after receiving the suitcase, went upstairs and met Morris in a luncheonette where they were both arrested.[2]

The distribution of these narcotics formed the basis of Counts Four and Five against Capra, Guarino, DellaCava and Jermain. The narcotics were also used as evidence of the conspiracy, Count One. Capra, Guarino, and DellaCava claimed that the drugs were illegally seized, but the trial court ruled that none of these defendants had standing to raise Fourth Amendment objections to the admission of this evidence because none of them had retained a possessory interest in it.

The defendants contended that *Jones v. United States*, 362 U.S. 257 (1960), grants them automatic standing in

possessory crimes. The Supreme Court, however, has recently limited the availability of automatic standing under *Jones* to, at most, those charged with "an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." *Brown v. United States*, 411 U.S. 223, 229 (1973); *see United States v. Pui Kan Lam*, 483 F.2d 1202 (2 Cir. 1973); *United States v. Sullivan*, 488 F.2d 138 (5 Cir. 1973); *United States v. Hutchinson*, 488 F.2d 484 (8 Cir. 1973).[3] These defendants were not charged with physical possession at the time the goods were seized and, therefore, under the new criteria for standing stated in the *Brown* case, they had the burden of proving that they had retained a possessory interest.

To prove that interest, Capra, Guarino and DellaCava testified at the suppression hearing that the suitcase was theirs, that $38,000 was still owing for the drugs, and that their understanding with Morris was, if the drugs were defective in quality or stolen prior to delivery at Toledo, the front money would be returned. The trial judge dismissed these arguments as unpersuasive and held that the defendants transferred any interest they may have had in the suitcase or its contents when Ramos checked it on October 20, 1971; that any continuing interest of the defendants in the $38 suitcase, itself, was negligible; that the receipt of the front money satisfied the monetary interest which they had in the narcotics; and that [any warranty as to the quality of the narcotics or any special contract conditions as to risk of loss were irrelevant to the question of ownership of the seized goods.] See *United States v. Palazzo*, 488 F.2d 942, 947-48 (5 Cir. 1974). These findings were further supported by Ramos' testimony at the trial that all of the front money went to Capra, Guarino, and DellaCava, and that the balance due

of $38,000 was the share belonging to Jermain and him. Where defendants, through the use of front money and baggage checks, have exerted such efforts to insulate themselves from personal possession of narcotics, they are hardly in a position to object that they have been "hoist with their own petard." None of the defendants was able to prove that his reasonable expectations of privacy were infringed by the search of the suitcase, see *Katz v. United States*, 389 U.S. 347 (1967), and, consequently, each lacks standing to challenge the legality of the search.

While Jermain might have been able to establish a possessory interest on the basis of the money owed, he did not seek to do so at trial and cannot make such a claim for the first time now. See *United States v. Gitlitz*, 368 F.2d 501 (2 Cir. 1966), *cert. den.* 386 U.S. 1038 (1967).

The trial court, therefore, was correct in denying the motions to suppress because these defendants lacked standing to question the propriety of this search and seizure.[4]

II. The Wiretap at Diane's Bar

To corroborate Ramos' testimony that this was an ongoing conspiracy involving all the defendants, the Government offered several transcripts and recordings of wiretaps involving DellaCava, Guarino, and Capra, and the testimony of the officers who conducted surveillance of the defendants on the basis of leads provided by the wiretapping. The defendants moved, prior to trial, for the suppression of this entire line of evidence on the ground that it was the product of unauthorized eavesdropping.

At the suppression hearing the evidence disclosed that in an investigation, unrelated to the Toledo search, the New York City Police, in late 1971, began surveillance of

Diane's Bar at 2034 Second Avenue, Manhattan, where a reliable informant had said one Joseph DellaValle was using the public telephone to arrange narcotics sales. Detective George Eaton of the Special Investigations Unit, Narcotics Division, listened to two telephone conversations between the informant and DellaValle when narcotics orders were confirmed. On the basis of these calls, personal observation, and other information provided by the informant, Eaton and a New York State Assistant District Attorney, Clifford Fishman, prepared an affidavit and application for an eavesdropping warrant pursuant to Article 700 of New York's Criminal Procedure Law. In his affidavit, Eaton apprised the court that he could recognize DellaValle's voice, based on the two prior calls, and on December 8, 1971 a state court warrant was issued for "the interception of telephonic communications of Joseph DellaValle with co-conspirators, accomplices and agents."

Although Eaton had previously participated in wiretaps, Fishman had never supervised such an operation. But more experienced members of the prosecutor's office briefed Fishman on the danger of intercepting non-pertinent telephone calls, and Eaton's superior in the police department, Lieutenant John Hill, testified that, prior to the installation of the wiretap, Fishman had reviewed with Hill and Eaton certain precautionary procedures which they, in turn, repeated to all the other police participants in the eavesdropping.

Extensive background noise at the Bar interfered with attempts to quickly discover the nature of the intercepted conversations. The officers frequently had difficulty understanding the words of the parties, and the pertinency of what was said was not immediately apparent because all narcotics transactions were disguised by use of various codes, i.e. "Christmas presents" meant heroin, a "chess

game" signified an exchange of narcotics, and a "four-room house with two stories" indicated four kilograms of heroin, cut twice.

The officers suspected at times that they might be confusing DellaValle's voice with that of another unidentified narcotics operator who had a similar husky-voice. Even those officers who, under another provision of the warrant, were eavesdropping on DellaValle's conversations over his home telephone, could not tell whether a second voice was being intercepted at the Bar. Eaton became concerned when the individual overheard was continuously called "Beansy," which was not one of DellaValle's known nicknames; references were made to "Beansy's wife" while DellaValle was thought to be single; and "Beansy" was said to be tending bar, which was not DellaValle's known occupation. But because of the voice and the nature of the business transacted, Eaton testified that he was reasonably sure that "Beansy" and DellaValle were one and the same individual until 2:15 in the afternoon, Sunday, December 19, when the speaker turned away from the telephone and was heard to ask, "How long are you going to be here Beans?"

The next day Eaton reported to Fishman that they had been inadvertently tapping two different individuals. Fishman replied that the warrant would have to be amended, but instructed Eaton to continue monitoring and surveillance to establish "Beansy's" identity, although Fishman and Eaton both testified that they were aware that a person's identity was not necessary to secure a "John Doe" warrant. See *United States v. Kahn*, ———U.S.——— (1974), 42 L.W. 4245. Even after Beansy was identified as Della-Cava, Fishman did not proceed with dispatch to have the warrant amended. He conferred with others in his office on amendment procedures; then took a long

Christmas week-end; and when he finally completed personally typing the application on January 2, 1972, he decided to hold it for four more days when the warrant expired and had to be renewed in any event. The warrant, therefore, did not authorize the interception of DellaCava's telephone conversations until January 6, 1972, 18 days after the police received notice that "Beansy" was not DellaValle, and 17 days after Fishman had been so informed.

Meanwhile, at 6:30 p.m., December 23, the police overheard "Beansy" call Ray's Stationery in the Bronx and ask for "Leo" or "Johnny Hooks." "Hooks" answered the telephone and told "Beansy" to pick up a package. Eaton followed "Beansy" to a Bronx Social Club where he saw him take a package from a Lincoln Continental and place it in his car trunk. Eaton traced the license plates on both cars and found that the Lincoln belonged to John Capra and that "Beansy's" car was registered in the name of Stephen DellaCava. Subsequent investigation confirmed that "Hooks" was Capra's alias, that "Beansy" was DellaCava, who tended bar at Diane's, and that "Leo" was Leoluca Guarino.

On the basis of this evidence, Capra, Guarino and DellaCava claimed: that Eaton had insufficient grounds to secure an eavesdropping warrant because he could not distinguish DellaValle's voice; that he had previously investigated DellaCava and was actually trying to intercept his calls when he applied for a warrant; that the police had failed to minimize the interception of calls unrelated to the original warrant authorization; and that all interceptions of DellaCava's calls prior to the renewal of the warrant on January 6, 1972 were unauthorized. The defendants contended that if the trial court upheld any of these objections all evidence which was the product of this wiretap should be suppressed.

The trial court found that Eaton's recognition of DellaValle's voice was founded on the two prior phone calls; that the New York court was fully apprised of this; and, that the warrant was, therefore sufficient on its face. It also found that Eaton's previous contact with DellaCava had been a brief and insignificant part of an earlier unrelated wiretap which did not concern or result in any investigation of the defendant or Diane's Bar and that the warrant issued in the present case, therefore, was not based upon pretext.

In connection with the minimization claim, defendants alleged that all calls, including non-pertinent calls to and from this public telephone had been monitored in full in violation of New York Crim. Pr. L. §700.30(7) and 18 U.S.C. §2518(5). But after an intensive analysis of the intercepted calls, the trial court found that out of the 1561 calls listed (1159 of which reached the party intended) only 751 were recorded in full. Approximately 620 of these did not exceed two minutes, and 200 of the 235 calls involving DellaCava were also less than two minutes in duration. While the police did record several privileged conversations including a few with family members and one with a lawyer, the trial court found that this was not a commonplace practice in the extensive investigation. As a result of this analysis as well as Fishman's and Eaton's efforts to limit interception of non-pertinent calls, the district court concluded that "all reasonable efforts were made to comply with legal requirements."

The district court recognized that one of the most difficult questions in this case concerned the legality of the interception of DellaCava's conversations. It found that the confusion of DellaValle's and DellaCava's voices was a good faith mistake, caused by their similarity and the poor monitoring conditions, and, therefore, held that there was

no violation of the eavesdropping warrant prior to the realization that "Beansy" was not DellaValle. It, however, also held that the police and the State prosecutor did commit error in delaying the application for an amendment of the warrant until 17 days after they learned that "Beansy" was not DellaValle. But the court said the delay was "reasonable and outlawry . . . [was] not warranted" because of the State prosecutor's inexperience and lack of secretarial assistance, as well as the intervention of the holidays.

At the trial, therefore, the court overruled the defendants' objections and admitted the evidence which resulted from the wiretapping, and the defendants appeal from each of those rulings.

This court is of the opinion that the trial court correctly ruled that the warrant, on which the wiretapping was based, was legally sufficient. The requisite contents of an affidavit for a state warrant are determined by state law, *United States v. Manfredi*, 488 F.2d 588 (2 Cir. 1973), *application for cert. pending* 42 L.W. 3524, and so long as the affiant presents a sufficient and truthful basis for a warrant, reviewing courts in New York have usually upheld the issuance of the warrant. See *People v. Porter*, 354 N.Y.S.2d 424 (Sprm. Crt. App. Div. 1st Dept. 1974). In this case, the State court issued the ex parte order on the reasonable assumption that Eaton could distinguish DellaValle's voice over a public telephone in a bar and the fact that this assumption was frustrated to a substantial degree by an unusual combination of circumstances does not render nugatory the supporting affidavit.

This court is also in accord with the district court's ruling that the issuance of the warrant by the State court was not based upon a pretext. See *People v. Asaro*, 47 Misc. 2d 373, 291 N.Y.S.2d 613, *aff'd* 34 A.D.2d 968, 312 N.Y.S.2d 807 (1968).

In reviewing the district court's ruling on minimization, state law must again be applied, *United States v. Rizzo*, 491 F.2d 215 (2 Cir. 1974); New York, however, has interpreted its minimization provisions in light of the federal statute which goes no "further than to require that the methods used to effect minimization be in good faith and reasonable." *United States v. Manfredi*, 488 F.2d at 600; *United States v. Tortorello*, 480 F.2d 764 (2 Cir.), *cert. den.* 414 U.S. 866 (1973); *see also People v. Castania*, 340 N.Y.S.2d 829 (Monroe Cty Crt 1973). Although the trial court's analysis of these interceptions revealed that many non-pertinent calls had been intercepted, a vast majority of these did not exceed two minutes, "too brief a period for an eavesdropper even with experience to identify the caller and characterize the conversation," especially under the circumstances of this case. *United States v. Bynum*, 485 F.2d 490, 500 (2 Cir. 1973), *judgment vacated on other grounds*, ———U.S.——— (1974), 42 L.W. 3652. Defendants asserted that the interception of any non-pertinent calls is prima facie evidence of failure to minimize, but the trial court correctly concluded that the police in this case reasonably complied, in good faith, with minimization requirements.

The trial court's denials of the defendants' motions to suppress the evidence resulting from the calls to and from DellaCava between December 19, 1971 and January 6, 1972, were, however, error. The warrant only authorized the interception of conversations by Joseph DellaValle "with" conspirators; and the knowing interception of calls involving DellaCava, rather than DellaValle, was, therefore not within the officers' discretion. *Osborn v. United States*, 385 U.S. 323 (1966); *Marron v. United States*, 275 U.S. 192 (1927).[5]

The government asserts that whatever infirmity resulted

from this warrantless tapping was cured by the inclusion of DellaCava in the renewed warrant issued on January 6, 1972, but it fails to state from what source it derived the authority to maintain the warrantless eavesdropping for the preceding 17 days. New York's eavesdropping statute makes no provision for warrantless interception. New York Crim. Pro. L., Art. 700,[6] and the government has cited no cases in which New York courts have construed this statute otherwise.[7]

Moreover, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, 18 U.S.C. §2510 et seq., prohibits warrantless eavesdropping, except under two specially defined circumstances, i.e., national security and an emergency. Title III creates federal wiretapping procedures that also operate as national standards which only permit the states "to adopt *more* restrictive legislation, or no legislation at all, but *not less* restrictive legislation." (emphasis added.) Senate Rpt. No. 1097, April 29, 1968, 1968 U.S. Code Cong. and Adm. News 2112, 2187. The standards are to be construed strictly, because Congress knew that it was creating an investigative mechanism which potentially threatened the constitutional right to privacy, and it carefully wrote into the law the protective procedures for the issuance of warrants which the Supreme Court had declared in *Katz v. United States, supra,* and *Berger v. New York,* 388 U.S. 41 (1967), were "constitutional precondition[s] of . . . electronic surveillance." *Katz,* at 359; see 1968 U.S. Code Cong. and Adm. News 2113, *supra.*

Under 18 U.S.C. §2518(10)(a), Congress made clear its intention "to require suppression where there is a failure to satisfy any of those statutory requirements that directly and substantially implement the Congressional intention to limit the use of intercept procedures to those situations

clearly calling for the employment of this extraordinary investigative device." *United States v. Giordano*, ——— U.S. ——— (1974), 42 L.W. 4642, 4649. See also *In Re Evans*, 452 F.2d 1239 (D.C. Cir. 1971), cert. den., 408 U.S. 930 (1972).

Obviously failure to amend the warrant was not justified by national security considerations, or by the presence of an emergency.[8] Even assuming arguendo that DellaCava's conversations constituted an emergency within the meaning of §2518(7)(a), the continuation of the eavesdropping for 17 days would still not qualify under the emergency exception to the statute because such interceptions must be terminated within 48 hours if, within that time, no warrant has been secured. *Id.*[9]

The district court, therefore, had no discretion to decide whether to exclude the evidence obtained in violation of Title III. The good faith efforts and worthy intentions of the police, the prosecutor's lack of experience and need of secretarial assistance, as well as his election to give priority to a holiday, are wholly extraneous considerations.

All of DellaCava's intercepted conversations between December 19, 1971 and January 6, 1972, are ordered suppressed.[10]

Publicity at Time of Arrest

Capra, Guarino, and DellaCava were arrested on the night of April 13, 1973, as part of a round-up of over 80 alleged narcotics dealers. Three days later, New York newspapers, each of which have extensive circulation, carried front-page articles which featured detailed on-the-scene reports of the arrests. *New York Post*, 4/16/73, p. 1, 4; *New York Daily News*, 4/17/73, p. 1, 3, 11-13, 39; *New*

York Times, 4/17/73, p. 1, 37. The *New York Daily News* showed photographs of Capra in handcuffs leaving his house, the police car on the freeway carrying Capra to the federal detention center, and Guarino, handcuffed, entering the detention center. The *News*' on-the-scene report included a description of the interior of Capra's "opulent" New Rochelle home on the night of the arrest.

At a suppression hearing regarding another issue Bernard Gallespie, the New York police sergeant who arrested Capra, disclosed that the New York City Police Public Relations Director, who was a non-commissioned officer, and a *New York Daily News* reporter had accompanied him on the night of the arrest and that they had entered Capra's home. These men were not identified at the house as reporters, and the Capra family apparently assumed that they were plain-clothesmen. Gallespie stated that a *New York Magazine* reporter and a *New York Times* photographer were also outside Capra's house that night.

The trial judge questioned the veniremen to make sure that none of them had prior knowledge of this case; the court also allowed the defendants six additional preemptory challenges to insure impartiality. The defendants, therefore, after the selection of the jury, did not claim that the jurors had been influenced by the publicity, but they did contend that the trial court, under its supervisory powers, should suppress the indictment because the government actively encouraged this publicity. The trial court withheld its ruling on the motion until the jury had returned its verdicts, at which time the court posed a series of questions to the government to determine the extent and nature of the pre-arranged publicity.

The government's answers established that on the evening of April 13, 15 minutes before the officers, who were to participate in the secret arrests, met for a briefing

at the New York headquarters of the Bureau of Narcotics and dangerous Drugs, the Narcotics Unit Chief of the United States Attorney's office was informed that members of the press would be present during part of the briefing and would accompany officers making arrests. He initially objected but he acquiesced when the Chief of Domestic Enforcement of the United States Drug Enforcement Administration and New York City's Deputy Police Commissioner for Organized Crime Control insisted that the only way to keep the raids secret and prevent possible flights of the accused was to guarantee to members of the press a special story which they, in turn, agreed not to publish for three days.

The government denied that the press was allowed to attend the entire briefing and asserted that, in accordance with the public relations guidelines of the Department of Justice, 28 C.F.R. §50.2, the reporters were only provided with the names of the defendants, their addresses, age, marital status, and the charges against them. Nonetheless, the trial court pointed out that newspaper photographs showed the briefing session in progress, and that the newsmen appeared to have been fully cognizant of the code words and the communications system to be used.

The government admitted that after the briefing, members of the press did accompany officers to the various scenes of arrest. It conceded that this was in contravention of the guidelines of the Justice Department, *supra*, and stated that it would use its best efforts to insure that such an incident would not recur. The government, however, failed to assure the trial court that members of the press would not be allowed to attend arrest briefings in the future.

Although the trial court was of the opinion that the government's conduct was ill-conceived and said it was

particularly concerned because the government apparently did not intend to exclude the members of the press from arrest briefings, it held that the circumstances did not require the suppression of the indictment.

After oral argument before this court, however, the government did state "that the press should not be invited to meetings where law enforcement officers discuss plans to arrest persons accused of criminal conduct," that is to say, arrest briefings.

The trial court correctly held that there was no showing of prejudice in this case. Absent proof of bias on the part of individual members of a jury, reversal, because of extensive publicity adverse to the accused, is required where, after reading or hearing it, a resulting conclusion of guilt in the minds of the general public would be practically certain, *Sheppard v. Maxwell,* 384 U.S. 333 (1966); *Rideau v. Louisiana,* 373 U.S. 723 (1963), or where improper pressure on a jury was clear from the record itself, *Estes v. Texas, 381 U.S. 532 (1965),* neither of which the trial court found here. But allowing members of the press to attend pre-arrest briefings of the police presents the grave danger that undue publicity will, in advance of trial, convict the accused in the minds of the general public and seriously prejudice his right to be accorded a fair trial by an impartial jury.

The government has belatedly stated that it will not *invite* members of the press to these briefings. In the exercise of its supervisory powers, *United States v. Marshall,* 360 U.S. 310 (1959), this court is of the opinion that the Government must not *allow* the press to be present at such meetings.

The Government's actions did not deny the defendants due process in this case, but to insure that future trials are not prejudiced, the Government must not permit their recurrence.

The trial court's denial of the motion to suppress the indictment is affirmed.

The Car Search

Prior to trial, DellaCava moved to suppress certain evidence, including $13,900, a machine for sealing plastic bags, and some traces of heroin, seized from his car at the time of his arrest on April 14, 1973. After holding a hearing, the trial court found that the following events had occurred.

At the arrest briefings, Detective Eaton, Sergeant Timothy Restivo of the New York Police Department, together with Group Supervisor James Becknar and Special Agent David Samuel of the Bureau of Narcotics and Dangerous Drugs, were assigned to apprehend DellaCava. He had been under surveillance all day, and the officers were told that they would find him at Bachelors III, on the Upper East Side. Just before 2 a.m., Eaton saw DellaCava's brown 1973 Oldsmobile 98 parked near the restaurant; officers who were waiting to apprehend others at the scene confirmed that DellaCava was there.

They decided not to arrest him in the restaurant, and thus alert the other suspects, but, rather, to "stake out" his Oldsmobile. Shortly after 2 a.m., DellaCava left the restaurant, made two telephone calls from different public phones, entered his car, and drove north on Lexington Avenue. He was followed by the officers, who stopped him at 86th Street and placed him under arrest. To avoid the crowd which had gathered, the officers decided to transfer the arrest proceedings to an underground sanitation garaga at 79th Street and the Hudson River.

Special Agent Samuel testified at the suppression hearing that, upon arrival at the garage, the officers

"impounded[ed] the car for safekeeping." Samuel removed the keys from the ignition, and Eaton, Becknar, and Restivo thoroughly searched the entire vehicle. Restivo found the sealing machine and a brown gym bag containing $13,900 in the trunk. Laboratory tests subsequently revealed that the interior of the bag was covered with traces of heroin powder.

The government contended at the hearing that this was a routine inventory search for the protection of the defendant's property, but the trial court properly rejected that argument because, even though the police may have "exercised a form of custody or control" over the car, they clearly conducted the search for the purpose of securing incriminating evidence. *Cady v. Dombrowski*, 413 U.S. 433, 443 (1973).

The district court, nevertheless, held that the police, viewing the movements of the defendant on the night of the arrest in light of their prior knowledge of his use of automobiles in narcotics transactions, had reasonable cause to believe that the car was being used to transport contraband and was, therefore, subject to forfeiture. 49 U.S.C. §781; 21 U.S.C. §881.[11] The court noted that Samuel had actively worked on the case for a month and, during the eight months prior to the arrest, had become familiar with DellaCava's role. It also found that Eaton had maintained his surveillance of DellaCava since the wiretap at Diane's Bar. The district court stressed that the indictment, under which DellaCava was arrested, contained allegations of dealings in narcotics which reinforced the agents' belief that DellaCava was engaged in transporting drugs that evening.

If agents have probable cause to believe that a car is or has been used for carrying contraband, they may summarily seize it pursuant to the federal forfeiture statutes

and search it. See *United States v. Ortega*, 471 F.2d 1350 (2 Cir.), *cert. den.* 411 U.S. 948 (1973); *United States v. Ayers*, 426 F.2d 524 (2 Cir.), *cert. den.* 400 U.S. 842 (1970); *United States v. Francolino*, 367 F.2d 1013 (2 Cir 1966), *cert. den.* 386 U.S. 960 (1967).

While agreeing with the trial court "that the question is a close one," this court finds no basis for reversing the district court's holding that "the search on balance should be held lawful" and that there was probable cause to believe that the car was being used to carry contraband on the night of the arrest. *Chambers v. Maroney*, 399 U.S. 42 (1970); *Brinegar v. United States*, 338 U.S. 160 (1949); *Carroll v. United States*, 267 U.S. 132 (1925).[12]

Severance

Defendants Capra, Jermain, Morris and Harris requested severances below on the ground that the evidence failed to prove a single conspiracy. They argued that the prosecution actually revealed multiple conspiracies, which should have been tried separately. *Kotteakos v. United States*, 328 U.S. 750 (1946).

The trial court properly denied these motions. When a continuing, chain-relationship between the defendants as importers, distributors, and sellers is proven, see *United States v. Sisca*, ———F.2d——— (2 Cir. 1974) Slip Op. 3413; *United States v. Rizzo*, 491 F.2d 215 (2 Cir. 1974); *United States v. Bynum*, 485 F.2d 490 (2 Cir. 1973), and where the evidence against the particular defendants who request severance is not "so little or so 'vastly disproportionate' " in comparison to that admitted against the remainder of the defendants, *United States v. Rizzo*, *supra*, at 218, severance is not required. The trial judge instructed the members of the jury not to consider evidence

against any defendant once he had ceased to be a member of the conspiracy; this sufficiently protected the defendants under the circumstances of this case.

The remaining claims raised by the defendants do not have sufficient merit to require discussion.[13]

Conclusion

The judgments of conviction against Capra, Guarino and DellaCava on the first or conspiracy count are reversed because of the admission into evidence of the recordings and transcripts of the illegal electronic interceptions of their conversations and the testimony regarding the resulting police surveillance of their activities. *Giordano, supra.*

Because they were not parties to the intercepted calls, Jermain, Morris and Harris were not "aggrieved persons" within the meaning of 18 U.S.C. §2518(10)(a); they therefore, lacked standing at the trial to contest the admission of the evidence resulting from the electronic surveillance. 1968 U.S. Code Cong. & Adm. News 2185; *Alderman v. United States,* 394 U.S. 165, 175-176 n.9 (1969). *Wong Sun v. United States,* 371 U.S. 471 (1963). "Coconspirators and codefendants have been accorded no special standing" to enforce the exclusionary rule. *Alderman v. United States, supra,* at 172. Their convictions on the conspiracy count are affirmed. *Brown v. United States, supra.* 411 U.S. at 230; *United States v. Garcilaso de la Vega,* 489 F.2d 761, 763 (2 Cir. 1974); *United States v. Pui Kan Lam, supra,* 483 F.2d at 1205; *United States v. Solis,* 469 F.2d 1113, 1114 n.1 (5 Cir. 1972), *cert. den.* 410 U.S. 932 (1973).

The record shows that none of the evidence resulting from the illegal wiretaps was used to prove the guilt of any

of the defendants, Capra, Guarino, DellaCava and Jermain, on the substantive charges, Counts 2, 3, 4 and 5. All of the events relating to these four counts, and all of the relevant events encompassed in the counts, occurred prior to the installation of the wiretap; moreover Ramos' testimony on these charges was independently corroborated. There is no indication in the record nor was there a claim by any of the defendants that the police identified Ramos or asked him to testify as a result of evidence uncovered by the wiretaps. See *Wong Sun v. United States, supra; Giordano, supra.*

The judgments of conviction entered on Counts 2, 3, 4 and 5 against the defendants Capra, Guarino, DellaCava and Jermain are affirmed.

It is so ordered.

FOOTNOTES

1. Some of the illegal activities in this case occurred prior to May 1, 1971, when the Comprehensive Drug Abuse Prevention and Control Act of 1970, Public Law 91-153, became effective. These activities formed the basis for substantive counts 2 and 3, which charged violations of the earlier laws, 26 U.S.C. §§4705(a) and 7237(b). The remaining substantive counts charged violations of the new laws, 21 U.S.C. §812, §841(a)(1), and §841(b)(1)(A). *The conspiracy spanned both these time periods and, thus, violated both 26 U.S.C. §7237(b) and 21 U.S.C. §846.*

2. Morris, Middlebrook and Ramos were convicted in August, 1972 for possession of these narcotics in violation of Ohio state law. Ramos, a second offender, was sentenced to 10 to 20 years imprisonment, *and in November, 1972, he agreed to turn state's evidence in return for the government's promise to aid him in securing parole.*

3. Defendants are no longer forced to choose between admitting or asserting constitutional rights because *Simmons v. United States*, 390 U.S. 377 (1968), holds that nothing a defendant states to prove standing can be used against him as evidence in chief at trial. See *United States v. Pui Kan Lam*, 483 F.2d 1202, 1205 n. 4 (2 Cir. 1973).

4. Assuming arguendo that the defendants did have standing, this court is in agreement with the trial court's alternative holding, that this was a private search, and not subject to the Fourth Amendment. *Burdeau v. McDowell*, 256 U.S. 465 (1921). The government didnot instigate this search, *United States v. Cangiano*, 464 F.2d 320 (2 Cir. 1972), vacated on other grounds, 413 U.S. 913 (1973), aff'd ———F.2d——— (2 Cir. 1973); Slip Op. 5661, application for cert. pending, 42 L.W. 3596; rather, it was motivated by a genuine concern on the part of railroad personnel for the safety of railroad property, fellow employees, and themselves. See *United States v. DeBerry*, 487 F.2d 448 (2 Cir. 1973). This concern was understandably engendered by the unusual baggage check, Ramos' nervous behavior, the weight of the suitcase, the delay in claiming it, and prior exposure, through media and personal experience, to bomb scares. Police participation was not so pervasive that the opening of the suit case was primarily for "the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action." *Haerr v. United States*, 240 F.2d 533, 535 (5 Cir. 1957). And when police are merely assisting a private party, who has authority to search and a legitimate need to do so, see *United States v. Antonelli*, 434 F.2d 335 (2 Cir. 1970), courts are reluctant to exclude resulting evidence. *Wolf Low v. United States*, 391 F.2d 61 (9 Cir.), cert. den. 393 U.S. 849 (1968). See generally *United States v. Blum*, 329 F.2d 49 (2 Cir.), cert. den. 377 U.S. 993 (1964).

5. Because this court is of the opinion that reversal of the conspiracy count as to Capra, Guarino and DellaCava is mandated by both the illegal wiretapping after December 19 and the resulting taint of police surveillance and subsequent wiretaps, see *United States v. Giodano*, ———U.S. ——— (1974), 42 L.W. 4642, the questions of whether the interception of DellaCava's conversations prior to December 19, when the trial court found that the officers in good faith reasonably believed that they were listening to DellaValle, was authorized by State law and within the meaning of the federal wiretapping law, 18 U.S.C. §2510, et seq., or permissible under the Constitution *Katz v. United States*, 389 U.S. 347 (1967), are left open for future consideration.

6. The New York Constitution, Art. 1 §12, apparently bars warrantless wiretapping:

> "The right of the people to be secure against unreasonable interceptions of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

7. *People v. Sher*, 68 Misc. 2d 917, 329 N.Y.S.2d 2 (Green Cty Crt 1972) permits retroactive amendment of a New York warrant to bustitute specifically identified persons for "John Does" and to add new crimes to those previously

listed on the warrant. *Neither of these changes invades the privacy interests of a person whose conversations could not have been interpreted under the original authorization.*

8. Congress had in mind by use of the term "emergency" an important event, limited in duration, which was likely to occur before a warrant could be obtained. Senate Rpt. No. 1097, 1968 U.S. Code Cong. and Adm. News 2112, 2193.

9. The government contends that *United States v. Cox*, 449 F.2d 679 (10 Cir. 1971), cert. den. 406 U.S. 934 (1972), construes the federal statute to permit a court to validate by retroactive approval a warrantless interception. Like *People v. Sher, infra*, n. 4, however, *Cox* merely allowed police, who were authorized to listen to all conversations concerning a particular crime over a private telephone but who also overheard another conversation about plans for a different criminal offense, to continue to listen to conversations relating to both crimes without immediately seeking an amendment to the warrant.

10. Defendants also continue to argue in this court that all interceptions, even those prior to December 19, must be suppressed because the government failed to provide an inventory of the intercepted phone calls within the statutory time period, N.Y. Crim. Pro. L. §700.50(3), and because the tapes were not immediately sealed after the eavesdropping ceased. *Id.*, §700.50(2). The trial court found that the State court had authorized the delay in filing the inventory in order to protect the secrecy of on-going investigations and that the defendants had shown no prejudice resulting from either delay. Under these circumstances, the trial court was correct in holding that neither New York nor federal law requires suppression. *People v. DiLorenzo*, 330 N.Y.S.2d 720 (Rockland Cty Ct. 1971); *United States v. Ciril*, ———F.2d——— (2 Cir. 1974), Slip Op. 3297; *United States v. Manfredi*, 488 F.2d 588 (2 Cir. 1973), application for cert. pending 42 L.W. 3524; *United States v. Rizzo*, 492 F.2d 443 (2 Cir. 1974).

11. §781(a), 49 U.S.C., reads:

> "It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article."

§881(a)(4) of 21 U.S.C. also subjects to forfeiture all vehicles used to transport narcotics.

12. Even if it were assumed that part of Eaton's familiarity with DellaCava's use of automobiles was derived from what was learned by way of the illegal

wiretaps sixteen months before, this court would not be justified in finding error in the trial court's holding of probable cause. *The federal agent Samuel, under cross-examination by defense counsel, testified that during the eight months prior to the arrest, he had learned of the Toledo delivery and the respective roles of Capra, Guarino, Ramos and DellaCava.* From this, the trial judge could infer that Samuel had knowledge of the fact that Ramos, six months prior to the arrest of DellaCava, had told Federal authorities that DellaCava acted as a narcotics deliveryman. None of Ramos' testimony was derived from the illegal wiretaps, *United States v. Tane,* 329 F.2d 848 (2 Cir. 1964), and, therefore, on the night of the arrest, an independent and untainted source of information supported the agents' decision that DellaCava's activities gave rise to probable cause to believe that he was transporting contraband. *Wong Wun v. United States,* 371 U.S. 471 (1963); *United States v. Falley,* 489 F.2d 33 (2 Cir. 1973); *James v. United States,* 418 F.2d 1150 (D.C. Cir. 1969); *United States v. Epstein,* 240 F. Supp. 80 (S.D.N.Y. 1965).

13. The motion by David Blackstone, Esq., attorney for the appellant George Harris, for leave to withdraw as assigned counsel is denied.

The motion by the Government for dismissal of the appeal by Harris is denied in view of the fact that the appeal has been heard and decided.

APPENDIX B

MEMORANDUM OF JUSTICE FRANKEL DATED OCTOBER 16, 1973

(SAME TITLE)

FRANKEL, D.J.

Defendant Della Cava, named in a warrant under the instant indictment charging conspiracy to commit narcotics violations and substantive narcotics offenses, was arrested on the early morning of April 14, 1973. The arrest was made when he stopped his automobile for a red light at Lexington Avenue and East 86th Street in New York City and agents who had been following intercepted his vehicle with theirs. The arrest was part of a large-scale "roundup" of alleged narcotics violators in and around New York City. Della Cava had been under surveillance for 15 minutes or so before the arrest, beginning when he emerged from Bachelors III, a restaurant and bar on Lexington Avenue in the east sixties, and walked some two or three blocks north to enter his auto. The arresting officers had determined, however, that the arrest should be made, if possible, at a substantial distance from Bachelors III to avoid alerting other persons scheduled for apprehension in the same operation.

Following his arrest, Della Cava was searched quickly on the scene. As strangers began to gather, the arresting officers took him and his automobile to an underground Sanitation Department garage in the area of West 79th Street and the Hudson River. There, Della Cava's auto was searched. Taking his keys, the officers opened the trunk, where they found, *inter alia*, a brown gym bag and a machine for sealing plastic bags or containers. In the bag, the officers found $13,999 in currency. Later laboratory examination revealed traces of heroin in the bag.

There was no search warrant, and Della Cava did not consent to the search. Contending that the search was illegal, he moves for suppression of the items found in the car trunk.

As a first ground, Della Cava claims that the arrest was deliberately delayed to supply a pretext for searching the vehicle. The contention is not supported by the record. On the contrary, the evidence is convincing that the officers were prompted by valid concerns about the effectiveness of their overall arrest assignments and about possible physical dangers if confederates were prematurely alerted. The court has become convinced, not only in the hearing relating to the instant motion, but in allied pretrial hearings, that the network of communications among arrest targets was a wide and swift one. The precautions attending Della Cava's arrest were reasonable and sensible, not pretextual. See *McKnight v. United States*, 183 F.2d 977 (D.C. Cir. 1950).

There remains the question whether the warrantless search was "reasonable" by Fourth Amendment standards. See *Cady v. Dombrowski*, 41 U.S. L.W. 4995, 4996 (June 21, 1973). On this subject of automobile searches, which has not produced a simple and symmetrical jurisprudence, it may not be astonishing that law enforcement officers and counsel lack neat or entirely consistent theories. One officer's report described the search as "incident" to the arrest, but this is not much argued now. The main theory of justification now is that it was an "inventory search," designed to protect both the owner (in his property rights) and the arresting officers)against false charges of depredation). But this justification has little or no support in the record.

Nevertheless, looking at the time, place, and other circumstances of the search, the court finds it reasonable.

The vehicle, taken in a narcotics arrest, was thought by the arresting officers to be on its way to being "impounded." The thought was a cogent one; the automobile could readily have been thought subject to forfeiture, and perhaps should have been labeled for that purpose, though it was not. The forfeiture statute, 49 U.S.C. §781 *et seq.*, makes it unlawful to transport or possess in any vehicle, or to use any vehicle to facilitate the transportation or possession of, contraband. Any narcotic drug which has been acquired or is possessed in violation of any laws of the United States dealing therewith is specifically defined as contraband. §781(b)(1). Subject to several exceptions, not material here:

> "Any *** vehicle *** which has been or is being used in violation of any provision of §781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited ***." 49 U.S.C. §782.

Under this statute, therefore, federal officers have a right and duty to seize a vehicle when they have reasonable cause to believe it "has been or is" being used in violation of the law in the transportation of contraband. There is a corollary right to search such a lawfully seized vehicle. See *Cooper v. California*, 386 U.S. 58 (1967); *Carroll v. United States*, 267 U.S. 132 (1925); *United States v. Francolino*, 367 F.2d 1013, 1018-23 (2d Cir. 1963) (alternative holding), cert. denied, 388 U.S. 960 (1967); *Davida v. United States*, 422 F.2d 528, (10th Cir.), cert. denied, 400 U.S. 821 (1970); *United States v. Ayers*, 425 F.2d 524, 530 (2d Cir.), cert. denied, 400 U.S. 842 (1970); *United States v. Lewis*, 303 F. Supp. 1394, 1396-97 (S.D.N.Y. 1969).[1]

In the case at hand, it is evident that the officers had reasonable cause to believe at the time of the arrest that the

vehicle was being (or had been) used in violation of the law regarding transportation of contraband and, therefore, was subject to seizure. Although at the pre-trial hearing, the officers tended to downplay their knowledge of Della Cava's alleged involvement in narcotics activities as well as their interest in his vehicle, the realities seem clear enough. Agent Samuels, while working on this particular case for only a month, had learned of Della Cava in a drug context some eight months earlier. Similarly, Detective Eaton had been involved since late 1971 in the investigation which led to the indictments. During that time Eaton had conducted surveillance of this defendant, had monitored wiretap conversations indicating narcotics transactions (including vehicular transportation), and had participated in a prior arrest of this defendant for a narcotics violation. Finally, and not insignificantly, the indictment under which Della Cava was being arrested added to the pertinent showing of "probable cause." Given these circumstances the officers had reason to believe that the defendant's vehicle was subject to seizure under 49 U.S.C. §782.[2]

Viewing the occasion as we should, from the vantage point of the officers on the spot, we are led to hold that the search "was closely related to the reason [Della Cava] was arrested, the reason his car had been impounded, and the reason it was being retained." *Cooper v. California*, 386 U.S. 58, 61 (1967).[3]

The court concludes, in sum, that the question is a close one, but that the search should on balance be held lawful. Compare *Evans v. United States*, 385 F.2d 824, 825 (7th Cir. 1967), with *United States v. Stevenson*, 409 F.2d 354, 357 (7th Cir. 1969). Our doubts are perhaps justified by the uncertain state of the controlling authorities. What seems more clear is that police officers do not behave unreasonably when they resolve close questions of this kind

in the fashion here presented. Given the somewhat limited "privacy" interest of Della Cava in his auto trunk on the occasion in question, *Cady v. Dombrowski*, 41 U.S. L.W. 4995, 4997 n.* (June 21, 1973), this court is unable to conclude that the things found there must be barred from consideration as evidence.

The motion to suppress is denied. So ordered.

Dated, New York, New York
October 16, 1973

s/Marvin E. Frankel
U.S.D.J.

FOOTNOTES

1. See also the Controlled Substances Act of 1970, 21 U.S.C. §801 *et seq.*, which provides, subject to exceptions not material here, for the forfeiture of all vehicles "which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment" of illegally manufactured, distributed, or acquired controlled substances or of raw materials, products and equipment used in the illegal manufacture and delivery of controlled substances. §881(a)(4). Any property subject to forfeiture may be seized by the Attorney General upon process, although seizure without process may be made when—

> "the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant." §881(b)(1).

The regulations promulgated under this section, 31 C.F.R. §316.71 *et seq.* (1973), authorize all special agents of the Bureau of Narcotics and Dangerous Drugs to seize such property as may be subject to seizure. *Id.* §316.72.

2. The fact that forfeiture proceedings were not instituted is pertinent but not decisive; the key inquiry is what were the powers of the officers in the light of what they knew and reasonably believed at the time of the search. See *Lockett v. United States*, 390 F.2d 168, 172 (9th Cir.), cert. denied, 393 U.S. 877 (1968). Although the officers testified that they were "impounding" the vehicle for "safekeeping," their rationale for their right to seize and search the vehicle is not conclusive. "Officers of the law cannot be held to know all of the niceties of the law and if it is determined that their actions have the sanction of the law, such actions are completely legal for all purposes." *Davida v. United States*, 422 F.2d 528, 531 (10th Cir.), cert. denied, 400 U.S. 821 (1970).

3. In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the Court impliedly recognized that the presence of contraband may justify a warrantless search of a vehicle. Distinguishing *Carroll v. United States*, the Court noted that the facts of *Coolidge* involved "no contraband or stolen goods or weapons ***." *Id.* at 462.

APPENDIX C

MEMORANDUM ON PRETRIAL PUBLICITY

(SAME TITLE)

FRANKEL, D.J.

The events leading to the trial in this case included actions by law enforcement officers resulting in massive and lurid publicity for their activities. The defendants herein were among scores taken in a "roundup" in the night and morning of April 13-14, 1973. The numerous arrests were supposedly to be accomplished with the utmost secrecy. Yet press reporters and photographers were invited to be present, and at work, through all the stages of the operation.

On the night of April 13, 1973, the officers scheduled to participate in the arrests assembled for instructions in a carefully cloaked meeting at the headquarters of the Bureau of Narcotics and Dangerous Drugs (BNDD). The watchword, we are told, was D-Day style security. However, those in attendance included newspaper and magazine photographers and reporters, busily taking photographs of the officers, not omitting high-ranking police officers and top members of the United States Attorney's staff.

As the arresting officers fanned out for their missions throughout the New York metropolitan area, media people went along. Some of the official vehicles (it is not clear how many) carried photographers and reporters as well as the law enforcement people who must be presumed to have been the only ones properly authorized to be in such vehicles at such a time. It appears that one or more reporters actually entered the homes of arrestees with the officers so that they might describe the detailed cir-

cumstances of the arrests, home furnishings, and other essentials that the people are said to have a right to know.

There was little if any serious violence attending the arrests, but action scenes were caught and recorded in the exuberant flashing of camera lights. The arrested people were photographed coming from their homes, clubs, and elsewhere. Cameraman, all duly alerted, were ready at BNDD headquarters and elsewhere to show the arrested people, including an old lady, variously handcuffed, "struggling" in the fierce grip of official hands on each arm, attempting to conceal their faces, or otherwise portraying their roles in the drama.

The press in this area had a ball for a couple of days in the week subsequent to the arrests. The roundup was described in intimate, paperback detail — the tension of the secret briefings, the bantering of officers all wound and ready to spring, the long accounts of patient sleuthing leading to this finale. There were the usual references to "reputed organized crime figures." A reporter for the sedate *Times* captured on the front page the "sense of exhilaration." He told how many of the arresting officers were themselves kept in the dark until the very last minute. A Deputy Police Commissioner was quoted as saying on the critical evening before the arrests:

> "We cannot have a leak. We cannot have a leak now. This is a historic night. So I want to wish each of you good luck."

Reflecting further this sense of history, the same high official was quoted in another press organ as saying the roundup made "the French Connection case look like a pebble compared to a boulder." Months later, at the trial of the instant case, a government chemist was to exhibit a similar instinct for what counts in history. Asked about a crude testing device for heroin, he found it useful as a

scientist to compare it to devices seen in the motion picture. "The French Connection." The expectable motion for a mistrial was denied then, as have been other arguments to defeat this prosecution, but matters of this kind may yet take on a more sinister aspect when viewed from some appellate height. It is to be questioned in any event how clearly the ends of justice are perceived in an atmosphere where it has become so habitual to hold the mirror of nature up to Hollywood's art.

Other details of the publicity may be omitted for present purposes. They are in the court's record for reference on review and otherwise.[1] Enough has been mentioned to make clear, it might be thought, why the court found in these matters grounds for concern. The troublesome problem of reconciling freedom of the press with the right to a fair trial is familiar to everyone. This court, like others, has a rule on the subject, which appeared very possibly to have been violated.[2] The Department of Justice also has a commendable-sounding rule, which might be read to proscribe press briefings and photographic arrangements for "secret" arrests on serious indictments.[3] The question of the integrity of the Department's own functioning might have been supposed to cause concern in that quarter, quite apart from the now familiar principle that an agency may deny due process if it fails to obey its own regulations. E.g., *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-68 (1954); *Service v. Dulles*, 354 U.S. 363, 388-89 (1957); *Yellin v. United States*, 374 U.S. 109, 120-21 (1963). As for the court itself, our "supervisory power," if it means something, must entail an alert sensitivity to indications that the federal prosecutor and/or federal law enforcement officers have participated in, or quietly condoned, transgressions against court rules, executive rules, and commands of the Constitution.

Accordingly, after the verdicts had been returned in this case, the court, in a memorandum dated November 27, 1973, directed the United States Attorney to explain and comment upon the above-described events. Specific questions were put to develop some facts about the publicity, the roles of government counsel and law enforcement officers, the views of the government as to whether there had been improprieties, and the possible needs for remedial action by the United States Attorney, the court, or both. Defense counsel were invited, of course, to present their positions.

Perhaps surprisingly, at least to this court, the initial response of the United States Attorney was a five-page letter explaining why no response should be required on the merits of the questions. First of all, in a probably accurate observation, the United States Attorney took issue with the statement in our November 27 memorandum that the subject of publicity had been "left for further consideration at a later time." Whatever the court may have had in mind, it does not appear that any formal "reservation" of this nature was made on the record. Then the United States Attorney reminded us that the usual precautions had been taken in selecting the jury; that the required assurances had been given by those selected; and that there were no grounds in our record for claims of error in this respect. It was said that "[i]f an inquiry relating to pre-trial publicity were ever appropriate in this case, surely it could have been conducted before and not after the conclusion of a five-week jury trial."[4]

The demurrer was overruled. The United States Attorney then proceeded to give his responses to our inquiries. In the paragraphs following this one, we set out, first, each of the eight numbered categories of information called for by the court, then the respective submissions in response from the United States Attorney, in full or

essential part, be required on the merits of the questions. First of all, in a probably accurate observation, the United States Attorney took issue with the statement in our November 27 memorandum that the subject of publicity had been "left for further consideration at a later time." Whatever the court may have had in mind, it does not appear that any formal "reservation" of this nature was made on the record. Then the United States Attorney reminded us that the usual precautions had been taken in selecting the jury; that the required assurances had been given by those selected; and that there were no grounds in our record for claims of error in this respect. It was said that "[i]f an inquiry relating to pre-trial publicity were ever appropriate in this case, surely it could have been conducted before and not after the conclusion of a five-week jury trial."[4]

The demurrer was overruled. The United States Attorney then proceeded to give his responses to our inquiries. In the paragraphs following this one, we set out, first, each of the eight numbered categories of information called for by the court, then the respective submissions in response from the United States Attorney, in full or essential part, and thereafter the court's comments in instances where comments have seemed appropriate.

> "(1) A listing of the media representatives (reporters, photographers, and any others) who were present at the assembly of law enforcement officers on the night of April 13, 1973, at B.N.D.-D. headquarters, or at any other such meeting, where instructions for the arrests were given."

Response: "No media representatives were present at any meeting 'where instructions for the arrests were given.' Three reporters and two photographers were present for a limited time at an assembly of law enforcement officers at

Drug Enforcement Administration ('DEA') headquarters, 555 West 57th Street, New York, N.Y. . . . Their limited presence and the reasons for it are set forth in No. 6, below."

Comment: Defendants in answer point out that the press stories appearing soon after contained what purported to be detailed police information; e.g., as to an arrestee having a machine gun, as to the total number to be arrested, as to conversations about their mission among the police officers. *The New York Times* on its front page for Tuesday, April 17, 1973, purported to quote and describe first-hand the address of the BNDD Assistant Regional Director outlining to the assembled officers things like the composition of the arresting teams, the use of code names and armbands, the location of his own command post, the procedure for handling prisoners, and other items of instruction. The United States Attorney's brief assurance may be literally consistent with all this, but it does not necessarily volunteer a rounded picture. If the details were vital for the present, we would surely require the evidentiary hearing defendants propose (note 1, *supra*).

> "(2) A listing of such representatives, along with an indication of their respective media, who accompanied arresting officers on their arrest missions of April 13-14."

Response: Three named journalists "accompanied law enforcement personnel on the arrest of John Capra only."

Comment: This is presumed to be literally true, provided we take pains, as the United States Attorney evidently did, to read the court's question as referring only to the few "arrest missions" involved directly in the instant case. However, the newspaper accounts showed that journalists fanned out all over the metropolitan area, obviously knowing where to go (or being taken), to cover other

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arrests, which were then recounted in colorful detail as well as in photographs.

> "(3) A list of the names of those supervisory personnel of the law enforcement agencies who authorized the presence of these media representatives."

Response: Presence of media representatives was authorized by the Chief of Domestic Enforcement of the Drug Enforcement Administration and New York City's Deputy Police Commissioner for Organized Crime Control.

> "(4) A statement as to whether the United States Attorney or his representatives joined in such authorizations."

Response: "No."

Comment: Good.

> "(5) If the answer to "(4)" is no, a statement whether responsible members of the United States Attorney's office (a) knew of, (b) acquiesced in, or (c) opposed such participation by media representatives. If there was opposition, state who expressed it and how."

Response: The Chief of the United States Attorney's Narcotics Unit and an Assistant United States Attorney, destined to try the instant case, were at the briefing session. Fifteen minutes before it began the Narcotics Unit Chief "learned for the first time that media representatives were to attend the session. [He] expressed disapproval to [the Drug Enforcement Chief and the Deputy Police Commissioner] but was assured by [the latter] that their presence was necessary in order to avoid 'leaks.' [The Commissioner] told [the Narcotics Unit Chief] that he had commitments from the heads of the newspapers involved that this would prevent news of the arrests from being

prematurely leaked. [The Unit Chief] was not told nor did he learn until well after the events that media representatives were permitted to accompany law enforcement personnel on the arrest of John Capra."

Comment: This ought to be recognized to be as unacceptable as it is disheartening. Such a record of feeble, ineffectual protest is not more reassuring than the report about the strategy for dealing with "leaks." Have we indeed become so impotent that we must open the floodgates to selected press people to prevent leaks? Does the United States Attorney, who reports this without comment, believe this is the best we can do? Holmes was surely right when he said judges are naive. Perhaps it is better so. But we must be permitted to hope that resignation to the disaster here described may not be compelled. At a minimum we would wish to go back to our English mentors to consider how they, merely human, manage this business so much better.

> "(6) A statement by the United States Attorney as to whether the participation of media representatives should be deemed to have been proper."

Response: "In the light of the considerations disclosed to this office after the fact, I cannot say that the limited presence of media representatives at this briefing session was illegal or improper.

"With respect to accompanying law enforcement personenl on the arrest set forth in No. 2, above, under the circumstances as I understand them, I regard this as ill-advised and would not have approved of it. However, defendant Capra was not prejudiced in his right to a fair trial by this development.

"The facts and considerations on which my answers to this question are based are set forth in [a Drug Enforcement Administration] report of May 21, 1973 to then

United States Attorney Whitney North Seymour, Jr., a copy of which is attached."

Comment: This vies with the two succeeding responses for the position of most discouraging. We are told in effect that the kind of glamourized, adventure-story press accounts preceding the instant trial may be expected to recur. It is perhaps a small answer, but enough for now from a *nisi prius* judge, to say that repetitions of such performances, now that the matter has been considered in all its gravity, should lead to sterner and more positive action by the court than mere expressions of disapproval. In the meantime, we invite further study by the United States Attorney, hopeful that such attention may produce sharper restrictions at the law enforcement sources upon these varieties of press coverage.

> "(7) A statement by the United States Attorney as to what remedial action, if any, he has taken or proposes to take. State, for example, whether consideration has been given to the institution of contempt or other proceedings under this Court's Criminal Rule 8."

Response: "Shortly after these arrests Whitney North Seymour, Jr., then United States Attorney, expressed disapproval to [DEA's Domestic Enforcement Chief], based upon the press coverage, of the manner in which arrests were handled insofar as the press was concerned and requested [the latter] to supply a full written report about the press coverage surrounding the execution of the arrests and during the period preceding the arraignment. As noted in No. 6 above, [the latter's] report dated May 21, 1973 is attached. This constitutes the remedial action taken by the United States Attorney concerning this matter. No consideration has been given by this office to the institution of contempt or other proceedings under Rule 8 of Criminal

Rules of this Court, since Rule 8 by its terms applies only to lawyers and courthouse personnel."

Comment: The "remedial action" is unimpressive. Mr. Seymour is to be commended for his concern in this, as in other things. It is striking, however, that nothing whatever seems to have been done at any higher level. After all, both the Drug Enforcement Administration and the United States Attorney are under the Department of Justice. We might have hoped that some top official in the Department, its regulation (note 3, *supra*) having been flouted, would have taken steps to back up the vain expressions of "disapproval" by the United States Attorney. It may be imagined that steps will yet be taken. If they are not, this case may become part of a demonstration that the courts must move against the evil with such weapons as they have available.

> "(8) A statement of position as to what remedial action, if any, should be taken by the court."

Response: "It is the Government's position that under the circumstances no remedial action by the Court is warranted. However, in order to avoid any possible future problems of this nature, it may be in order for the Court to consider recommending that Criminal Rule 8 of this Court be amended to apply to appropriate investigative agencies in addition to lawyers and courthouse personnel."

Comment: Again, the court regrets that our executive officers deem themselves unwilling or unable to clean their own houses. Creative voices tell us they have been infected by the publicity of some months earlier.

At the same time, it seems fitting to underscore that the mere gnashing of judicial teeth should not remain the sole response to such law enforcement behavior. We hear a lot these days about the subversion of law and order by rules

like that of *Mapp v. Ohio*, 367 U.S. 643 (1961), excluding good evidence "merely" because it was lawlessly gotten. The prisoner must not lightly be freed because the constable has blundered. On the other hand, if the constable assures that he can do no other than blunder some more, the time must come when we either surrender our professed rights or enforce them as well as we can.

The United States Attorney scarcely embraces the whole of the matter when he concludes in this case that this particular trial has not been demonstrated to have been vitiated by sordid publicity. We assure trial juries every day that an indictment may not be taken as evidence. We mean that in a profound sense even though we expect our grand juries to have evidence before they indict. But the atmosphere and our principles are polluted if the indictment and arrest become the circuses they too often are, complete with prosecutors' press conferences and photographic spreads.

This court will expect that the response of the United States Attorney to these cautionary reminders will be consonant with the traditions of his great office.

Dated: New York, New York
January 8, 1974

s/Marvin E. Frankel
U.S.D.J.

FOOTNOTES

1. Defendants request a hearing to develop more fully the details of the publicity and of governmental participation in generating it. As is suggested below, the court is not persuaded that the account we have is by any means complete. The request is denied, however, on the premise that further elaboration of the facts would not alter the conclusion that the court should not attempt any specific form of remedial action at this time.

2. Our Criminal Rule 8, entitled "Free Press-Fair Trial Directives," provides in part as follows:

> "(a) It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.
>
> "With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial statement, for dissemination by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.
>
> "From the time of arrest, issuance of an arrest warrant or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:
>
> "(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;
>
> "(2) The existence of contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;
>
> "(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;
>
> "(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the

announcement is not otherwise prohibited by law;

"(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

"(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case."

3. Department of Justice regulations published at 28 CFR §50.2 provide in seemingly pertinent part:

"(a) *General.* (1) The availability to news media of information in criminal and civil cases is a matter which has become increasingly a subject of concern in the administration of justice. The purpose of this statement is to formulate specific guidelines for the release of such information by personnel of the Department of Justice.

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"(b) *Guidelines to criminal actions.*

"(1) These guidelines shall apply to the release of information to news media from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise.

"(2) At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial, nor shall personnel of the Department furnish any statement or information, which could reasonably be expected to be disseminated by means of public communication, if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial.

"(3) Personnel of the Department of Justice, subject to specific limitations imposed by law or court rule or order, may make public the following information:

"(i) The defendant's name, age, residence, employment, marital status, and similar background information.

"(ii) The substance or text of the charge, such as a complaint, indictment, or information.

"(iii) The identity of the investigating and/or arresting agency and the length or scope of an investigation.

"(iv) The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of physical items seized at the time of arrest.

"Disclosures should include only incontrovertible, factual matters, and should not include subjective observations. In addition, where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public.

*****

"(7) Personnel of the Department of Justice should take no action to encourage or assist news media in photographing or televising a defendant or accused person being held or transported in Federal custody. Departmental representatives should not make available photographs of a defendant unless a law enforcement function is served thereby."

Apart from its immateriality, the contention seems unsound. Our trial began in October, six months after the publicized arrests. To revive the publicity by a hearing about it was not clearly desirable. The court is not required in the circumstances to treat the subject as forever closed.

APPENDIX D

MEMORANDUM OF JUSTICE FRANKEL DATED NOVEMBER 27, 1973

(SAME TITLE)

FRANKEL, D.J.

Among the many subjects touched in pretrial hearings and left for further consideration at a later time was the matter of pretrial arrangements for publicity attending the mass of arrests on the morning of April 13-14, 1973. There remain questions as to whether these activities should be grounds for remedial action of any kind in the exercise of the court's supervisory power over the business of law enforcement attending federal prosecutions.

Government counsel are now directed to present, in addition to other submissions contemplated for defendants' post-trial motions, the following:

(1) A listing of the media representatives (reporters, photographers, and any others) who were present at the assembly of law enforcement officers on the night of April 13, 1973, at B.N.D.D. headquarters, or at any other such meeting, where instructions for the arrests were given.

(2) A listing of such representatives, along with an indication of their respective media, who accompanied arresting officers on their arrest missions of April 13-14.

(3) A list of the names of those supervisory personnel of the law enforcement agencies who authorized the presence of these media representatives.

(4) A statement as to whether the United States Attorney or his representatives joined in such authorizations.

(5) If the answer to "(4)" is no, a statement whether responsible members of the United States Attorney's office

(a) knew of, (b) acquiesced in, or (c) opposed such participation by media representatives. If there was opposition, state who expressed it and how.

(6) A statement by the United States Attorney as to whether the participation of media representatives should be deemed to have been proper.

(7) A statement of the United States Attorney as to what remedial action, if any, he has taken or proposes to take. State, for example, whether consideration has been given to the institution of contempt or other proceedings under this Court's Criminal Rule 8.

(8) A statement of position as to what remedial action, if any, should be taken by the court.

The foregoing submissions should be served and filed by December 17, 1973.

Defense counsel are invited, of course, to present materials they deem appropriate on this subject. Without limiting the scope of such submissions, the court recalls that there were placed before us in pretrial hearings some photographs of people being arrested, including some evidently being "posed" for photographers. It may be that materials of this kind will be appropriate for this or some higher court in considering the fairness and propriety of the proceedings leading to the convictions herein.

Defendants' submissions on this matter should be served and filed by December 24, 1973.

Dated, New York, New York
November 27, 1973

s/Marvin E. Frankel
U.S.D.J.

APPENDIX E
MEMORANDUM OF JUSTICE FRANKEL DATED DECEMBER 27, 1973

(SAME TITLE)

FRANKEL, D.J.

The actual trial of this case (including approximately a half day for jury selection and one and a half days for the jury's deliberations) required a total of approximately 19 court days. As is not uncommon, a substantial number of other days prior to trial were required for the hearing of motions to suppress evidence. In the end, the three motions requiring those 11 further days of hearing were all denied. One such denial has been embodied in an opinion which was given to counsel but not filed until after the verdict, all being agreed that there should be all possible efforts to avoid publicity for this case. The concern about publicity, coupled with the pressures of time, led to the postponement of opinions explaining the rulings on the other two motions. This is the last of such delayed opinions, accounting for denial of a motion to suppress a large shipment of heroin and cocaine found in a suitcase.

On October 28, 1971, the suitcase in question was opened in a baggage room of the Central Union Railroad Terminal in Toledo, Ohio. The suitcase was found to contain some 5½ kilograms of heroin and a kilogram of cocaine. The evidence thus disclosed came to be a substantial factor in a state narcotics trial in Toledo, where people there ultimately convicted sought unsuccessfully to suppress, claiming the requisite proprietary interest as grounds for their standing. Much later, as the instant case approached trial, three of the defendants herein brought on a similar motion, also claiming the necessary possessory interest.

As the motion in this case was originally presented, upon affidavits, the claim of a possessory interest by the movants — John Capra, Leoluca Guarino, and Stephen Della Cava was in general and conclusory terms.[1] A question arose as to whether such broad conclusions, particularly in the odd circumstances of this case, should be deemed sufficient to afford standing. The court concluded that the concrete facts claimed to demonstrate such an interest should be the subject of evidentiary exploration and should be exposed to cross-examination, this *** be comfortably open under the doctrine of *Simmons v. United States*, 390 U.S. 377 (1968), which bars the use of such testimony in the government's case in chief at trial. The *** customer. The customer would thereafter pick up the suitcase, thus taking his narcotics delivery. Other evidence later showed that the transaction was completed, except that the consignees were arrested in Toledo when they arrived to claim the "property."

Messrs. Capra and Guarino testified as to their partnership interests. The totality of the testimony of the three was to the effect that they all jointly owned the suitcase,[3] and thus had joint and several standing to seek suppression of its contents found in the Toledo search.

The testimony from this point proceeded to take on an ersatz flavor of the Uniform Commercial Code rather than our usual narcotics case.[4] The movants were taken through testimony by which they undertook to show that they never relinquished their possessory interest in the suitcase when it was given to the courier, the argument being that the risk of loss remained upon them.[5] As a further elaboration of this argument, they swore that they had not been paid in full for the narcotics, so that the ownership, as well as the risk of loss, never vested in the consignees.

The argument and the motion failed at this point. The

evidence, sufficiently at the suppression hearing and then beyond a reasonable doubt at the trial, showed that these movants, in the particular transaction and in many others, consistently demanded that the payment for their narcotics shipments be "up front"—i.e., in advance of shipment and delivery.[6] From the evidence before this Court, it appears that standing to attack the search, if it existed anywhere, resided in the consignees rather than the consignors. The movants here had been paid in full for their contraband and had no further interest of any kind either in the wrapping — the suitcase — or the contents. See *United States v. Epstein*, 240 F. Supp. 80, 82 (S.D.N.Y. 1965).

This conclusion seems sufficient in itself to defeat the motion.[7]

It should be noted, however, that on the further facts disclosed by our hearing, the motion to suppress would be denied in any event. The court concludes that upon the particular facts of this case, as they unfolded in Toledo, there was no such invasion of privacy through the opening of the suitcase as to require suppression of the fearsome things the suitcase contained.

The suitcase was checked at the baggage room of the Railroad Terminal at approximately 11:15 p.m. on October 20, 1971. The baggage agent on duty, Milton Julert, suggested to the depositor that the case be placed in a coin locker on the main concourse of the terminal where it would be safer. The man insisted, however, that it be kept in the baggage room. He stated that he would pick it up in a day or two.

Julert thought the circumstances suspicious. The baggage room was ordinarily used as a repository for periods of up to a few hours for luggage to be placed on or received from the two trains which daily passed through Toledo. The suitcase was the first item parcel-checked in

six months. In addition, the man who left the suitcase "acted funny," was "nervous and tense," and raised his voice aggressively in rejecting the agent's suggestion. Furthermore, when removing the bag to the storage area, Julert noted it was unusually heavy and made a "rustling" sound like cellophane or plastic. For a fleeting moment, he considered that the bag might contain a bomb. Since Julert was scheduled to be off for the next two days, he reported the presence of the suitcase to the relief baggage assistant, Charles Sibold. On Saturday, October 23, Sibold made a similar examination of the suitcase, noting its weight and the "swishing" sound it produced.

When the bag had not been claimed by Tuesday, October 26, Sibold and Julert discussed its continued presence and Sibold suggested that the Railroad police be contacted. Julert was concerned about the security of the suitcase. Sibold on the other hand was worried that it might contain explosives.

Sibold spoke the next day with Captain Albert Blevins of the Penn Central Police. Sibold related the circumstances surrounding the checking of the bag and indicated that he wished to open it. Both men then went to the baggage room where Sibold attempted unsuccessfully to open the suitcase with keys kept on hand. Blevins testified that his function was to act as a witness, pursuant to Penn Central policy, to protect the baggage agent and the company from future claims. By this time, Blevins was similarly concerned about the contents of the suitcase. He had been present on a prior occasion when the makings of a pipe bomb were discovered in a parcel stored in the Penn Central Station in Cleveland. Blevins told Sibold that he would try to get help in opening the bag, and that afternoon he requested such assistance from his friend and "primary contact" with the Toledo Police Department, Detective George Ryan. Blevins in-

dicated to Ryan his suspicion regarding the possible presence of explosives.

The following day, Thursday, October 28, 1971, Detective Ryan arrived at the terminal accompanied by Officer Gerry Bedal and Detective Robert Beavers. Bedal, who had experience in opening locks, had been en route to the station with Ryan when they met Beavers and invited him to join them. Both Ryan and Beavers were assigned to the Metropolitan Drug Unit of the Toledo Police Department. At the baggage room, Bedal, in the presence of Sibold, Blevins, and the two other officers, attempted unsuccessfully to turn the two locks on the suitcase with a screwdriver and a pick-like instrument. He finally opened the locks with paper clips provided by Blevins and Sibold. Sibold then took and opened the suitcase. Inside there were a number of plastic bags containing a white powder and some towels. Officer Beavers picked up one bag with the initial "C" on it, opened and examined it, and showed it to Detective Ryan. Suspecting that the bags might contain narcotics, the officers requested a field test kit from the Metropolitan Drug Unit.

When the field test of the "C" bag produced a positive result, several officers took two of the bags to a nearby laboratory for further examination. The suitcase and contents were stored overnight in a safe at the Terminal. The next day officers removed the plastic bags to the police station, replacing them with objects of equivalent weight.

On October 31, 1971, at approximately 8:15 a.m. Willie Middlebrook, named as a co-conspirator but not a defendant, presented the claim check and obtained the suitcase. In the main concourse of the terminal, he met defendant Alan Morris. Both were arrested by the Toledo police.

Upon the foregoing facts, the court would sustain the

seizure if there were occasion to reach the question. This was not an "intrusion" initiated by law enforcement officers "with the specific intent of discovering evidence of a crime ***." *Cady v. Dombrowski*, 41 U.S. L.W. 4995, 4997 n.* (June 21, 1973). See also *Haerr v. United States*, 200 F. 2d 533, 535 (5th Cir. 1957). It was in fact a "private" search in the ample sense that it was undertaken by private persons acting upon private suspicions touching legitimate concerns of their own and their employer. But for their inability to open the suitcase by themselves without damaging it, the railroad employees would never have involved the police. Failing in their own efforts, the baggage room employee and security officer were still concerned over the suspicious circumstances attending the stored bag—the somewhat menacing manner of the man who had left it, the long delay after the promise to return for it in a day or two, the unusual weight of the bag, and the disturbing sound of its contents.

While the railroad employees did not have or seek legal advice, their conduct was at least consonant with their employer's duties and rights—whether as a non-gratuitous bailee, see *O'Brien v. Penn. R. Co.*, 184 F. Supp. 305, 307 (S.D.N.Y. 1960); *United States Fire Ins. Co. v. Paramount Fur Service*, 168 Ohio St. 431, 156 N.E.2d 121 (1959); *National Liberty Ins. Co. v. Sturtevant-Jones Co.*, 116 Ohio St. 299, 156 N.E. 446 (1927); *F.E. Avery Co. v. George*, 160 N.E.2d 305 (Ohio App. 1959); cf. *Boyden v. United States*, 80 U.S. (13 Wall) 17, 21-22 (1877), or as a common carrier, see 47 U.S.C. §20(11); *Missouri Pac. R. Co. v. Elmore & Stahl*, 377 U.S. 134, rehearing denied, 377 U.S. 984 (1964); *Secretary of Agriculture v. United States*, 350 U.S. 162, 165 n. 9 (1956); *Continental Can Co. v. Eazor Express, Inc.*, 354 F.2d 222 (2d Cir. 1965); cf. *The Nitroglycerine Case*, 82 U.S. (15 Wall.) 524 (1872); *Bruskas v. Railway Express Agency*, 172 F.2d 915, 918 (10th Cir.

1949), to protect its own property, the property of passengers, and the physical safety of everyone against even modest, if not chimerical, dangers of explosions or other kinds of destruction.

When the Toledo police officers arrived in this setting, the occasion for their presence was primarily service to those who had enlisted their aid rather than the pursuit or detection of criminals. Undoubtedly, they were prepared to be interested in evidence of criminal misconduct. But they were not required to have a search warrant for the precautionary assistance they came to supply. See *Cady v. Dombrowski*, 41 U.S.L.W. 4995, 4997 n.* (June 21, 1973); *Haerr v. United States*, 240 F.2d 533, 535 (5th Cir. 1957); *Marshall v. United States*, 422 F.2d 185, 189 (5th Cir. 1970).

In short, the court would sustain this as an essentially private search and a lawful seizure under authorities not always perfectly harmonious but sufficient in their net effect to validate what was done here. *United States v. Blum*, 329 F.2d 49, 52 (2d Cir.), cert. denied, 377 U.S. 993 (1964); *Wolf Low v. United States*, 391 F.2d 61 (9th Cir.), cert. denied, 393 U.S. 849 (1968); *United States v. Averell*, 296 F. Supp. 1004, 1008-12 (E.D.N.Y. 1969); see *United States v. Beasley*, 485 F.2d 60 (10th Cir. 1973); *United States v. Echols*, 477 F.2d 37 (8th Cir. 1973), cert. denied, 42 U.S.L.W. 3195 (October 9, 1973); *United States v. Burton*, 475 F.2d 469 (8th Cir. 1973); *United States v. Cangiano*, 464 F.2d 320 (2d Cir. 1972), vacated on other grounds, 41 U.S.L.W. 3671 (June 25, 1973); *United States v. Tripp*, 468 F.2d 569 (9th Cir. 1972), cert. denied, 410 U.S. 910 (1973); *United States v. Gold*, 378 F.2d 588, 591 (9th Cir. 1967); *United States v. Pryba*, 312 F.Supp. 466,

472 (D.D.C. 1970). But cf. *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966).

Dated: New York, New York
December 27, 1973

Marvin E. Frankel
U.S.D.J.

FOOTNOTES

1. An affidavit of September 5, 1973, submitted by Della Cava and adopted by the other two defendants merely stated: "The bag *** was owned by me together with the defendants CAPRA and GUARINO at the time of the aforementioned Toledo search and seizure."

2. Della Cava testified:

> "Well, I don't remember dates exactly. What I do know iw that I purchased the bag that supposedly was met in Toledo. I purchased it in Korvettes and I paid 30-something dollars for it. I also put this narcotics in this bag, took this bag and delivered it to Ramos."

In response to the question whether Della Cava had discussed with Capra and Guarino the contents of the bag prior to loading it, he stated: "Yes, sir, we talked about the purchase of it, what went in it, what was going to go into it and who was going to get it."

3. The money used to purchase the bag was from what Della Cava termed a "kitty," contributed to by the three movants. Guarino elaborated on this in his testimony:

> "If we had to make any expenditures in conjunction with any of our businesses, he would relate it back to us and we would reimburse him. That's the extent of the kitty we had."

4. Illustration from Della Cava's testimony:

> "Q. Now, did you have any discussion with Mr. Ramos regarding what would happen, if anything, should the drugs be lost in transit, whose risk or on which party the risk of loss would fall?
> "Q. Who would be responsible.
> "A. I would be responsible."

See also these complaint responses by defendant Guarino:

> "Q. I want to ask you—Strike that.
> "With respect to what you felt in your mind back in October of 1971,

who was responsible for those drugs until the entire amount of money, as agreed upon, was paid?

"A. The four partners.

"Q. And if anything happened to those drugs, I don't care whether they were seized or whether they were destroyed, *who would stand the* loss with respect to that?

"A. The four partners.

"Q. That was your agreement?

"A. Yes.

"Q. And that was your state of mind?

"A. Correct.

"Q. Were you at any time, either you or your partners, paid in full as per the agreement you all had together?

"A. No.

"Q. Is it your testimony that you did not know to whom Mr. Ramos had agreed to ultimately dispose of the drugs with [*sic*]?

"A. Correct.

"Q. That was his business?

"A. I never inquired.

"Q. Your part of the partnership was to produce the drugs, give them to Ramos for the ultimate final sale?

"A. Correct.

"Q. And that sale was never materialized, was it?

"A. Correct.

"Q. There was still a balance due and owing the last time you saw those drugs?

"A. Correct.

Similarly, defendant Capra testified:

"Q. Was there a sale consummated prior to their receipt by the buyer?

"A. All they wanted was a partial payment down.

"Q. Would you tell me the arrangements?

"A. All right. I'll tell you the whole arrangements. The arrangements was we would not give anything up unless we got any money first, partial anyway.

"Q. That's known as front money; is that correct?

"A. That's correct. When we got the money, then we proceeded to give the money, take the narcotics with the assumption that if it is not what it's supposed to be or short or bad, or whatever, the money would come back to those people that put up the money for the narcotics. And we would get the narcotics back and we would turn it back.

"Q. What was your understanding if the narcotics were seized prior to the people receiving it in Toledo, Ohio?

"A. That's my responsibility because somebody, they can't pay for what they don't get.

"Q. Therefore, in your own mind and in actuality, you never

relinquished possession of the narcotics and the suitcase; is that correct?

"A. Never."

5. Della Cava testified that he and his partners "would get the money or the suitcase back" depending on whether or not the customers were satisfied with the shipment. Capra stated that "definitely" the partners would have to pay for the narcotics if they were seized. And, if the narcotics were short "it would be up to the people that were getting the delivery to do what they wanted with it, as far as maybe balancing it out with money or return it or just ask for the rest of the delivery."

6. Although the three movants testified at the hearing that they had only received a down payment for the narcotics shipment, their own figures belied this assertion. Any amounts still owing were for their codefendant Jermain and Joaquin Ramos, a co-conspirator who testified for the prosecution.

7. This result does not create any problem of inconsistency in the Government's positions of the kind considered in *Jones v. United States*, 362 U.S. 257, 263 (1960), quite apart from the somewhat open question as to how far such inconsistencies may matter under the law as it exists today. *Brown v. United States*, 411 U.S. 223, 228-29 (1973).

The motion to suppress was made, quite properly, in terms of Counts 4 and 5 of the indictment, which related to the transaction ending in the Toledo seizure. It was entirely consistent with the Government's position before trial, still more clearly at the trial, to show that the movants had possessed the narcotics, as the indictment alleged, "in the Southern District of New York," and that this possession ended when the suitcase was given in this District to a courier, well before the later search and seizure in Toledo.

APPENDIX F
MEMORANDUM OF JUSTICE FRANKEL DATED DECEMBER 4, 1973

(SAME TITLE)

FRANKEL, D.J.

Lengthiest among the extended pretrial hearings in this case was that generated by the contention that there had been a violation of 18 U.S.C. §2518(5) and N.Y. Crim. Pro. Law §700.30(7) because telephone interceptions pursuant to state authorizations had not been sufficiently "minimized." The issue was narrowed to require that we consider only the course of overhearing on one public telephone, at Diane's Bar. Even this turned out to require evidentiary hearings extending over some seven days. As a result of those hearings, and upon the study of detailed submissions on the law, the court denied the motions to suppress, but postponed until after trial the filing of an opinion explaining the decision. This memorandum gives the explanation.[1]

The eavesdropping warrant for the Diane's Bar tap was issued by New York Supreme Court Justice Harold Birns on December 8, 1971, and authorized the interception of the "telephonic conversations of JOSEPH DELLA VALLE *** pertaining to the purchase, sale, transfer, shipment or possession of narcotic drugs ***." On January 6, 1972, Justice Birns extended the order for an additional 30 days and amended the warrant to authorize the interception of:

> "telephonic conversations of JOSEPH DELLA VALLE and also telephonic conversations of STEVEN DELLA CAVA[2], with each other and with their co-conspirators, accomplices, and agents, *** pertaining to the purchase, sale,

transfer, shipment or possession of narcotic drugs ***."

Pursuant to these authorizations electronic surveillance was maintained from December 9, 1971 to February 4, 1972. The court has studied in detail the directions given to the monitoring officers, their functioning under these instructions, and the several grounds upon which the adequacy of the minimization is assailed, especially the central contention that defendant Della Cava was unlawfully overheard for an extended period before interception of his conversations had been authorized. As has been stated, the result of these studies has been a determination that the suppression motion could not prevail.

The evidence on this subject disclosed that those in charge of the eavesdropping enterprise were carefully attentive to, and concerned about, the minimization requirement. The office of District Attorney Hogan had a policy requiring not only that the police check with one of his assistant district attorneys, but further that the assistant check the planned operation in turn with an appellate member of the staff who had studied the federal statute and the materials relating to it. Careful instructions were given to the police officers requiring that they avoid intrusions upon privileged conversations and that they turn off conversations outside the scope of their authority to listen. The legal officers emphasized in their instructions the need for special care because of the fact that the tap was to be on a public telephone. The police were cautioned not to let the machine record while they were not monitoring, and this instruction appears to have been followed with detailed care.

In addition to these instructions, Assistant District Attorney Fishman was to be kept abreast of developments during the wiretap. He talked with the monitoring officers

several times a week and was furnished with logs and transcribed conversations.

The monitoring officers followed a prescribed routine. They signed in at the post and activated the recording machine when they went on a tour of duty. The machine was operative only while officers were present at the post. Although normally two officers were on duty, personnel requirements elsewhere were such that it was not possible at times to have more than one officer present. The hours of monitoring fluctuated depending on the availability of personnel and other investigative requirements; for example, the officers would shut down the operation when the subject left the bar and continue their investigation by visual surveillance. The machine (audio and record) was designed so that it was activated when a number was dialed or an incoming call received. A pen register identified numbers dialed. The officers logged almost all of the calls intercepted, noting the time, participants if identifiable, and the pertinency of the call (as it was estimated at the time). Ordinarily the two officers would listen together, with one taking notes, and then they would discuss the content of the call. Detective Eaton reviewed the tapes and then sent them "as soon as practical" to A.D.A. Fishman.

To appraise the adequacy of the minimization in light of the several precedents already available,[3] the court invited statistical analyses from the parties. Defendants claimed initially that all calls had been intercepted in full—that the officers had failed always to disconnect nonpertinent calls. This and other contentions proved, however, to be mistaken when the materials came to be examined in detail. It was shown that a total of approximately 1561 calls were intercepted (i.e., monitored and/or recorded) under the two Diane's Bar orders. Of these, 402 calls were "incomplete" in that they were to wrong numbers, calls for

information, busy signals, and the like. Of the 1159 completed calls, 751 were intercepted in full. 620 of these 751 were less than two minutes long, so that they may for our purposes be excluded from consideration. See *Bynum, supra,* slip op. at 5310.

As to the defendant Della Cava, whose intercepted conversations were at the center of the inquiry, there were 235 fully intercepted calls.[4] Of these, 200 lasted less than two minutes.

In the belief that hearings of this nature should be, if not entirely minimized, brought within limits consistent with the existence of other court business, we called upon the parties to prepare samples of the interceptions that could occupy a day or so of court listening and serve arguably to support the respective contentions. Defendants presented 86 calls for this purpose, and another 40 were added later to a compilation built upon agreed criteria. Of the total of 126, 76 were under two minutes in length.[5]

As to the remaining 50 conversations, it is evident with complete hindsight that a substantial number were properly to be deemed "pertinent" to the investigation. The exact number we would give today is scarcely decisive, however; for it is clear that the number would be too small to reflect fairly the efforts of the officers on the spot to "minimize" in light of the limited knowledge available to them. As would be expectable in any such situation, the calls of over two minutes in duration were characterized by changing participants, cryptic references, garbled and noisy reception, long delays while different parties were sought, and other difficulties rendering it unacceptable to insist that the police officers should have ignored or disconnected many of these calls sooner.

The papers emphasize that sounds that seem innocuous or unintelligible to the law-abiding soon came to be

recognized as code words for illicit conduct. Looking back over the eavesdropping record, we are advised and guided as to the words of this nature. For those involved in the police effort at the time, the task was less simple. There was no glossary to tell in advance that the references to "chess" and to "a little friend" very likely had to do with narcotics transactions. There was no clue to tell right off that a person announcing he was "sick" meant he was unable to deliver narcotics. Similar cases of Aesopian jargon had to be identified and made intelligible as the work progressed.

"Pertinency" is a concept of shifting and elusive dimensions. One conversation may be pertinent because it refers to an alleged exchange of narcotics, while another may be pertinent merely because it indicates the whereabouts and future movements of the subject. It is under the latter definition that the interception of calls between Della Cava and a woman named Jean would appear to have been justified. The defense has argued that such conversations were "personal" and should not have been monitored. The court during its listening session heard eight of these exchanges, of which five were over two minutes in duration. Portions of these conversations undoubtedly were intimate, including a quarrel which was monitored for nearly eight minutes. Yet others sounded suspicious and might have indicated to the officers that Jean was at the least cognizant of Della Cava's activities. Some contained references to where Della Cava was going and what he was doing. In the final conversation played for the court as part of the defense presentation, Della Cava indicated to Jean that he was going to stay at the bar for a while and then go "uptown"—a reference to a social club frequented by other defendants and used to transact their illicit business.

Voice identification proved to be a substantial problem during the wiretap. The male voices most frequently heard from Diane's Bar were fairly deep and characterized by inflections that may permissibly be called Italo-American. With hindsight and with the kind of repeated reasoning in which counsel engage during the work of a lawsuit—even in these laboratory conditions we have all perceived how easy it is to err. Thus, one of the conversations recorded and monitored in full, on December 13, 1971, was logged as that of "Beansie" with "wife." Listening to it after having acquired a substantial amount of expertise, the court noted it as involving "Beansie." It required the guidance of more expert counsel and a rehearing of the conversation by the court to become aware that Beansie was not actually a participant in this conversation.

This episode—and the more general subject of voice identification to which it relates—touches a central target of the defense attack, the delay in obtaining an amended order for the overhearing of Della Cava on the Diane's Bar telephone. During the initial ten days of the wiretap, the monitoring officers intercepted the conversations of a "Beans," "Beansie" or "Stevie" (now known to us as the defendant Della Cava) in the belief that he was the authorized subject, Joseph Della Valle. On or about December 11 or 12, certain developments raised a question whether "Beansie" was in fact Della Valle. While listening to the conversations thought to be those of Della Valle, Detective Eaton, the officer primarily in charge, began to detect a difference in the voices of "Beansie" and Della Valle. In addition, if "Beansie" was Della Valle, then the subject would have had five or six nicknames, a situation at least unlikely. It was not, however, until December 19, during the course of an intercepted conversation, that these doubts were resolved. The delay in reaching this point, in light of all the circumstances, is both understandable and

excusable. There never was, nor do defendants suggest, any reason whatever for the monitoring officers to pretend that Della Cava had not been distinguished as a separate voice when he actually had been.

We were made to realize in the course of our hearing that the monitoring officers worked in changing shifts and under quite different circumstances, with long pauses between calls, and frequently a different order of calls than that given to us in the selected group. Thus, it was pointed out on at least a couple of occasions that a relatively long call, seemingly innocuous or nonpertinent, which was not disconnected as our retrospective judgment would dictate, followed in fact a very sensitive and seemingly significant call which could have been deemed to have alerted and sensitized the officers to the prospect of more materials to come. The process of listening to the calls while consulting the logs demonstrated that some officers came to know one or another voice while others were ignorant of it. Thus, where an ignorant officer failed to disconnect a call, it is explained with some frequency on the ground that he was not aware of the nonpertinent character of the speaker.

The defendants have argued that the detective work done before and during the eavesdropping was insufficiently expert. It is said Detective Eaton should have gone with his informant to a better place in order to make telephone calls through which he undertook to learn and to be able to identify the voice of Della Valle. Similarly, it is said that Eaton was careless in failing to pick up references in conversations which would have excluded Della Valle as the subject. In one, reference was made to a wife, yet it was known or should have been known that Della Valle was unmarried. In another, the male participant indicated he was "tending bar" at Diane's—again eliminating Della Valle since it was known that he was not employed as a

bartender. Regarding the uncertainty that developed on December 12 about whether "Beansie" and Della Valle were the same person, the defense argues that the officers failed to take steps to resolve the misidentification. In particular, they failed to check the New York Police Department alias file to determine whether Della Valle had ever used the nickname "Beansie." Furthermore, a comparison of the monitoring logs from the Diane's Bar and Thieriot Avenue (Della Valle's residence) wiretaps would have revealed that "Blackie" (Della Valle) was at Thieriot Avenue at the same time "Beansie" (Della Cava) was at Diane's Bar. Contentions of a like nature are made with respect to other details.

The court has considered all such matters and is led to realize that the surveillance was not as meticulous and limited as more nearly perfect detective work would have made it. But none of the imperfections indicates more than human fallibility within tolerable limits. To be sure, better detective work would presumably have forestalled points pressed by defendants. But this is not because any of the omissions pinpointed now was generated by any disposition to ignore or violate the rights of privacy with which both the statutes and the Fourth Amendment are concerned.

A more serious argument—the most serious of those defendants present—is rested on the facts that (1) Della Cava was overheard under the December 8th order providing for interception of only *Della Valle* conversations, (2) the separate identity of Della Cava became known at least by December 19, but (3) the new order embracing Della Cava was not obtained until January 6, 1972. In the actual circumstances disclosed by the record, however, it seems clear that all reasonable efforts were made to comply with legal requirements that were neither simple for the police and prosecution officers attempting to

proceed lawfully nor necessarily pellucid to this court as the problem has come on for decision in relative tranquillity.

Detective Eaton reported to his police superior and to A.D.A. Fishman on December 20 the apparent identification of a separate voice which was to be attached three days or so later to Della Cava. Fishman concluded that the officers should seek to pinpoint the identity of this "Beansie" as precisely as possible before an amended order was sought. This seems in retrospect to have been an error. It would have been possible promptly upon ascertaining the separate identity of "Beansie" (and, simultaneously, the evidence that he was engaged in narcotics transactions) to have gotten an amended order covering him even though his correct name was not yet known.[6] It is not possible to doubt in the circumstances that an application for such an order would have been granted or that the affected officers would have known this at the time.

The question is, then, whether the delay in applying, given the explanation for the delay, should render the police conduct so unreasonable as to require suppression of the evidence thus procured. And this, the court believes, should be answered by viewing the problem from the vantage point of the law enforcement people on the scene, not only, or mainly, as a question of law to be answered "correctly" in the comfort of our library so long afterwards. It is in this light, on grounds largely stated already, that the thesis of defendants has been rejected.

Both the Congress and the New York Legislature, in their comparable enactments defining the scope of permissible wiretapping, recognized the likelihood that a wiretap would disclose "other crimes" than those within the authorization. To avoid the absurdity of forbidding the use of such information overheard in a lawful interception, both legislatures allowed disclosures to other law en-

forcement people. See 18 U.S.C. §2517(1), (2) and (5); N.Y. Crim. Pro. Law §700.65(1), (2) and (4). In addition, the federal statute provides that the contents of any such communication, or evidence derived therefrom, may be introduced in evidence in a criminal proceeding

> "when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of [the statute]." 18 U.S.C. §2517(5).

Such an application must be made "as soon as practicable." The Senate Report accompanying the statute reflects the predictable understanding that the subsequent application would include "a showing that the original order was lawfully obtained, that it was sought in good faith and not as subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order." S.Rep. No. 1097, 90th Cong., 2d Sess. 12 (1968), as quoted in U.S. Code, Cong. & Admin. News, 1968, p. 2189. Similarly, the New York statute allows the use of such interceptions as evidence

> "when a justice amends the eavesdropping warrant to include such contents. The application for such amendment must be made by the applicant as soon as practicable. If the justice finds that such contents were otherwise intercepted in accordance with the provisions of this article, he may grant the application." N.Y. Crim. Pro. Law, §700.65(4).

Although these two provisions deal specifically with the procedure to be followed when information relating to offenses other than those in the warrant is intercepted, their requirements should apply by close analogy to the converse situation—where the investigation of the "crime"

is expressly authorized but the parties are other than those named in the warrant. The purpose of both §700.65(4) and §2517(5) is to allow the use of incriminating evidence which has been incidentally intercepted. In fact, even an excessive addiction to the dictionary is satisfied by such a reading: Crime A by X is not the same "crime" as a similar offense by B. As stated in *United States v. Cox*, 449 F.2d 679, 687 (10th Cir. 1971), which upheld the constitutionality of §2517(5):

> "It would be the height of unreasonableness to distinguish between the information specifically authorized and that which is unanticipated and which develops in the course of an authorized search ***. It would be irrational to hold that officers authorized to listen to conversations about drug traffic, upon learning that a bank robbery is to occur, must at once close down the project and not use the information to prevent the robbery since the information is tainted. It would be demoralizing to allow the bank to be robbed while the investigators stood by helpless to prevent the occurrence. Harder cases can be imagined."

It would similarly be the "height of unreasonableness" to prohibit use of the information that another person is involved in the crime under investigation if the statutory requirements are followed.

Examining the conduct of the legal and police officials following December 19, the court concludes that it was reasonable and outlawry is not warranted. Although the amended order would and could have been obtained earlier, the delay of some 17 days, when that delay embraced Christmas and New Year holidays among other obstacles to speedy action, does not serve to make lawless and unavailable the evidence of wrongdoing which was

being sought with generally commendable attention to the constitutional and statutory proprieties.

Defendants complain also of undue delay in complying with statutory sealing and notice requirements. The answers are, *first*, that the delays were authorized by the State Justice who allowed the interceptions, *second*, that there has never been any remote suggestion of prejudice to any defendant from these asserted improprieties.

The sealing requirement serves, of course, "to safeguard the identity, physical integrity, and the contents of the recordings to assure their admissibility in evidence." S.Rep. No. 1097, 90th Cong., 2d Sess. (1968) as quoted in U.S. Code, Cong. & Admin. News, 1968 p. 2193. There has been no doubt in this case that Justice Birns was justified in relying upon the custodial facilities of District Attorney Hogan. More importantly, no defendant has questioned at any time the accuracy or integrity of the recordings. It would enshrine a technicality to proscribe the tapes in this setting. In any event, the entire omission of a seal need not be fatal. Delay in sealing is surely no more serious. *United States v. Poeta*, 455 F.2d 117, 122 (2d Cir.), cert. denied, 406 U.S. 948 (1972).

The delay in serving an inventory is less troublesome still. Such delays are countenanced for such obvious reasons as the one plainly applicable here—that a continuing investigation might be thwarted or impaired by premature disclosure of its existence. See 18 U.S.C. §2518(8)(d); N.Y. Crim. Pro. Law §§700.50(4), 700.05(7); S. Rep. No. 1097, in U.S. Code, Cong. & Admin. News, supra, at 2194.

To repeat and summarize, the foregoing records the

reasons why the motion to suppress evidence from the Diane's Bar interceptions was denied.

Dated: New York, New York
December 4, 1973

s/ Marvin E. Frankel
U.S.D.J.

FOOTNOTES

1. Some defendants urged that an array of other state taps, from which no evidence was to be (or, in the event, was) offered had to be studied for minimization to determine whether there might be tainted evidence at the trial. The court ruled that this subject, if it was ever to be considered, would be for post-trial study, when the evidence to be examined for taint would be concretely and fully known. Whether any defendant can or will make a showing warranting such post-trial consideration remains to be seen.

2. The indictment in this case names one Stephen "Dellacava." The defendant on an affidavit submitted to the court signed his name as Stephen Della Cava. The court will use the latter form.

3. *United States v. Bynum*, Docket No. 72-1857 (2d Cir. Sept. 24, 1973), came down toward the close of the evidentiary hearings herein.

4. The defense gave this figure as 223.

5. Of the 76, 14 lasted less than 30 seconds, 30 lasted between 30 to 60 seconds, and 20 were from 60 to 90 seconds.

6. An application for an eavesdropping warrant as well as the warrant itself must contain, *inter alia*, "the identity of the person, if known, *** whose communications are to be intercepted." N.Y. Crim. Pro. Law §§700.20(2)(b)(iv); 700.30(2). *People v. Sher*, 68 Misc. 2d 917, 329 N.Y.S. 2d 2, 8 (Greene Co. Ct. 1972). See also, 18 U.S.C. §§2518(1)(b)(iv); 2518(4)(a).

APPENDIX G

MEMORANDUM FOR COUNSEL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

JOHN CAPRA, et al.,

Defendants.

FRANKEL, D.J.

The court has pending three motions to suppress— (1) evidence found in a suitcase in Toledo, (2) evidence taken from defendant Della Cava's automobile, and (3) wiretap evidence under two New York State court orders. These several motions have been studied. For the guidance of counsel and the parties, it is reported that all three will be denied. A memorandum relating to the automobile search will be filed in the next day or so. Memoranda relating to the other two motions will not be filed until after the trial has been concluded, and will be filed then only if the circumstances make the record of the court's findings and conclusions necessary.

Dated: New York, New York
October 15, 1973

MARVIN E. FRANKEL
U.S.D.J.

APPENDIX H

EAVESDROPPING WARRANT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter
of
the placement and employment of electronic eavesdropping devices inside the ground floor of the premises 1023 Havermeyer Avenue, Bronx, New York, to overhear, intercept and record the conversations of STEPHEN DELLA CAVA, JOHN CAPRA, MICHAEL CAPRA, LEOLUCA GUARINO, and LENNY FILIPPONE, with each other and with their co-conspirators, accomplices, agents, suppliers, deliverers and customers, pertaining to illegal traffic in narcotics.

It appearing from the affidavit of Frank S. Hogan, District Attorney of the County of New York, and the accompanying affidavit of Detective George Eaton of the Special Investigations Unit, Narcotics Division, Organized Crime Control Bureau, New York City Police Department, said affidavits having been submitted in support of this eavesdropping warrant and incorporated herein as a part thereof, that there is probable cause to believe that evidence of the crimes of criminal possession of a dangerous drug as a felony and criminal sale of a dangerous drug as a felony, in violation of Article 220 of the Penal Law of the State of New York, may be obtained by overhearing, intercepting and recording the con-

versations of STEPHEN DELLA CAVA, JOHN CAPRA, MICHAEL CAPRA, LEOLUCA GUARINI, and LENNY FILIPPONE with each other and with their co-conspirators, accomplices, agents, suppliers, deliverers, and customers pertaining to illegal traffic in narcotics, inside the ground floor of premises 1023 Havermeyer Avenue, Bronx, New York, and the Court being satisfied that comparable evidence essential for the prosecution of said crimes could not be obtained by other means, it is

ORDERED, that the District Attorney of the County of New York, or any police officer acting under his direction, is hereby authorized and empowered to enter said premises and to plead therein and utilize electronic eavesdropping devices to overhear, intercept and record the conversations within said premises of STEPHEN DELLA CAVA, JOHN CAPRA, MICHAEL CAPRA, LEOLUCA GUARINO, and LENNY FILIPPONE with each other and with their co-conspirators, accomplices, agents, suppliers, deliverers and customers pertaining to illegal traffic in narcotics relating to the above mentioned crimes; and it is further

ORDERED, that should it be necessary for the facilities and lines of the New York Telephone Company to be utilized in the execution of this order, the agents and employees of the New York Telephone Company are directly constrained not to devulge the contents of this order nor the existence nor the presence of electronic eavesdropping devices inside said premises, nor the use of said lines and facilities to any person, including but not limited to the owners, lessors, lessees, tenants, residents, users or occupiers of said premises or subscribers of said facilities or equipment, whether or not the said owners, lessors, lessees, tenants, users, occupiers or subscribers of said premises, facilities or lines request that said premises, facilities or lines be checked for the existence of said

electronic eavesdropping equipment; and it is further

ORDERED, that this order shall be conducted in such a way as to minimize the interception of communications not related to the aforementioned crimes and that nothing herein contained shall be construed as authorizing the District Attorney or his agents to intercept or overhear any conversations of STEPHEN DELLA CAVA, JOHN CAPRA, MICHAEL CAPRA, LEOLUCA GUARINO or LENNY FILIPPONE which are otherwise privileged and it is further

ORDERED, that this order shall be executed as soon as possible, and shall be effective, at any hour of the day or night, and shall continue until evidence as described in the aforementioned affidavits shall have been obtained, and said authorization shall not automatically terminate when the communications described herein have first been obtained, but in no event to exceed thirty (30) days from said effective date; and it is further

ORDERED, that the effective date of this order will be the day, date and time that installation and connection of electronic eavesdropping devices inside said premises shall be completed, and that proof by affidavit of the installation and connection of said devices shall be made before the Court as soon as practicable; but in no event will the effective date of this order be any later than seven (7) days after the issuance of this order, i.e. September , 1972, whether or not installation and connection of such devices has been completed by said date.

Dated: New York County, September , 1972

JUSTICE OF THE SUPREME COURT

(TITLE)

***

FRANK S. HOGAN, being duly sworn, deposes and says:

1. I am the District Attorney of the County of New York, and as such make this affidavit in support of an application for an order authorizing the placement and use of electronic eavesdropping devices.

2. I have read the affidavit of Detective George Eaton, assigned to the Special Investigations Unit, Narcotics Division, Organized Crime Control Bureau, New York City Police Department.

3. Based upon the facts set forth in that affidavit, I respectfully submit to the Court that there is probable cause to believe that essential evidence of the crimes referred to therein may be obtained by the placement and use of electronic eavesdropping devices in the above-named described above.

4. In my opinion there are no alternative investigative techniques or procedures that could be used to acquire the essential evidence necessary to prosecute successfully the violators of the crimes described therein. I believe that the nature and scope of the criminal activities involved is of sufficient importance to warrant the employment of electronic interception devices.

WHEREFORE, it is respectfully requested that the annexed eavesdropping warrant be issued and made effective from the effective date as defined in paragraph 14 of Detective Eaton's affidavit, until and including thirty (30)

days from said effective date.

No previous application for the relief sought herein has been made to any other court of justice, except as noted in paragraph 4 of Detective Eaton's affidavit.

s/Frank S. Hogan
FRANK S. HOGAN

Sworn to
September 8th, 1972

(TITLE)

***

GEORGE EATON, being duly sworn, deposes and says:

1. I am a detective in the New York City Police Department, assigned to the Special Investigation Unit of the Narcotics Division, Organized Crime Control Bureau, and I am presently conducting an investigation to determine whether certain crimes of Criminally Possessing a Dangerous Drug as a Felony and Criminally Selling a Dangerous Drug as a Felony, both of which are crimes in violation of Article 220 of the Penal Law and are punishable by imprisonment for more than one year, have been and are being committed by STEPHEN DELLA CAVA, JOHN CAPRA, MICHAEL CAPRA, LEOLUCA GUARINO and LENNY FILIPPONE, with other co-conspirators, accomplices, agents, suppliers, deliverers, and customers in and about the County and City of New York.

2. This affidavit is submitted in support of District Attorney Frank S. Hogan's application for an eavesdropping warrant.

3. I have been a member of the New York City Police Department for approximately nine years. I have been assigned to the Narcotics Division for approximately three years. I have been assigned to the Special Investigations Unit of the Narcotics Division for approximately one year. I have participated in more than one hundred narcotics arrests and in investigations involving several previous eavesdropping warrants.

For most of the period I have been assigned to the

Special Investigations Unit, I have been conducting an investigation into the activity of STEPHEN DELLA CAVA and his associates. Recently this investigation has included a wire tap on STEPHEN'S AIR CONDITIONING and TV REPAIR, 2036 Second Avenue, New York, New York, under New York County District Attorney's Office Eavesdropping Warrants 71, 94, and 95 of 1972. Copies of the warrants and the supporting affidavits of Mr. Hogan and myself, are affixed to this affidavit and are herrby made a part thereof.

4. This application seeks authorization to place eavesdropping devices into the ground floor of the building at 1023 Havermeyer Avenue, Bronx, New York.

1023 Havermeyer Avenue is a three story building, with a large exhaust fan over the door, all the windows on the ground floor have been boarded over, except for one, which has a large air conditioner in it. It is situated at the intersection of Chatterton and Havermeyer Avenues, near the Cross Bronx Expressway. Its position is such that it is difficult for officers on foot or in vehicles to sit and ***

This building has been used as a meeting place by STEPHEN DELLA CAVA, JOHN and MICHAEL CAPRA, LEOLUCA GUARINO, LENNY FILIPPONE, and several other individuals (see discussions in following paragraphs). During the course of the court-authorized wiretap on STEPHEN'S AIR CONDITIONING STORE, several references to "the club" have been made, and were overheard, which have proved to be references to this premises; for this reason, and for purposes of brevity, henceforth references to "the club" are meant as references to 1023 Havermeyer Avenue, unless otherwise stated.

It is my opinion that STEPHEN DELLA CAVA, JOHN and MICHAEL CAPRA, LEOLUCA GUARINO, LENNY

FILIPPONE, ALFRED "HERBIE" CATINO, and other individuals utilize "the club" at 1023 Havermeyer Avenue to negotiate narcotics transactions and on occasion to divide and dispose of quantities of narcotics. The basis for this opinion is discussed below.

The previous arrests, if any, of DELLA CAVA, the CAPRAS, GUARINO and CATINO have been discussed in previous affidavits. FILIPPONE is known to the New York City Police Department under B# 808848. He has been arrested for: June 21, 1970— Grand Larceny Auto, June 4, 1971—Forgery, November 15, 1971—Possession of a Dangerous Weapon, February 28, 1972—Unauthorized Use of a Motor Vehicle, and May 27, 1972—Possession of a Dangerous Weapon and Possession of a Dangerous Drug.

5. The Court is respectfully referred to the following incidents.

5A. June 23, 1972. See paragraphs 7C, 7D, 7E, 7F ***

5B. *June 26, 2973.* See paragraph 5A of my affidavit of August 15, 1972. In my opinion JOHN CAPRA's reference to "the club" was a reference to 1023 Havermeyer Avenue.

5C. *July 6, 1972.* I am informed by Detective Frank DeMarco that on July 6, 1972 he was in the vicinity of 1023 Havermeyer Avenue, Bronx, New York and observed the following.

At 7:45 p.m., vehicles usually driven by MICHAEL CAPRA and LENNY FILIPPONE were parked nearby.

At approximately 9:30 p.m. an unknown Caucasian male, walked out of the club to an automobile parked nearby, took something from the trunk of this vehicle, entered the vehicle and drove away.

At approximately 10:10 p.m. STEPHEN DELLA CAVA drove up in front of the club, parked, left his vehicle, and entered the club.

At about 10:50 p.m. LENNY FILIPPONE left the club, entered his vehicle and drove away.

At about 11:00 p.m. STEPHEN DELLA CAVA left the social club, went to the trunk of his vehicle, opened it, and removed a large manila envelope from therein, and then returned to the front of the club and went inside.

At about 11:50 p.m. STEPHEN DELLA CAVA and MICHAEL CAPRA left the club, entered their respective vehicles and left the area.

5D. *July 12, 1972.* I am informed by Detective Robert Raco that on July 12, 1972, that shortly before 9:00 p.m. he followed LENNY FILIPPONE from the front of 1001 Castle Hill Avenue to the club at 1023 Havermeyer Avenue. Upon his arrival at the club he observed the vehicles normally driven by JOHN CAPRA and MICHAEL CAPRA parked in the ***

At approximately 10:15 P.M., a male white, who operated a vehicle registered to JOHN DRAGONETTI, of Taylor Road, Box 95, Mountainville, New York arrived, parked in front of the club and entered the club.

At approximately 10:15 p.m., GENNARO "JERRY" ZANFARDINO arrived in the area, parked his car, and entered the premises. (See paragraph 7-H of my affidavit of July 12, 1972 for a discussion of ZANFARDINO's background.)

5E. *July 14, 1972.* I am informed by Detective Brooks that on July 14, 1972 at about 8:20 p.m., he went to the vicinity of 1023 Havermeyer Avenue, Bronx, New York, and saw the vehicles usually driven by JOHN CARUSO, JOHN CAPRA and LENNY FILIPPONE. Detective Brooks tells me he observed the following:

At about 9:19 LEOLUCA GUARINO arrived in the area, less than a minute later MICHAEL CAPRA arrived

and entered the club with GUARINO.

At 10:17 p.m. STEPHEN DELLA CAVA arrived and entered the club.

At 10:53 p.m. LENNY FILIPPONE left the club, entered his vehicle and drove away.

at 11:15 p.m. LAFRED CATINO arrived, parked his car near the club, and met MICHAEL CAPRA who had just left the club; both then went inside.

At 12:06 a.m. JOHN CARUSO and MICHAEL CAPRA left the club, got into their cars, and drove away.

At 12:10 a.m. JOHN CAPRA, ALFRED CATINO, LENNY FILIPPONE, who had apparently returned to the club unnoticed, LEOLUCA GUARDINO, and STEPHEN DELLA CAVA all left the club, got into their vehicles, and drove away.

5F. *July 12, 1972.* I am informed by Detective Thomas that on July 17, 1972, between 9:00 a.m. and 11:00 p.m., he saw JOHN CAPRA, STEPHEN DELLA CAVA, LEOLUCA GUARINO, DONATO "FINNIGAN" CHRISTIANO and LOUIS "GIGI" INGLESE enter and leave 1023 Havermeyer Avenue; in addition he saw vehicles usually driven by MICHAEL CAPRA, LENNY FILIPPONE and vehicles registered to DOMINICK PESCE and DANIEL PANESSA parked in the vicinity of 1023 Havermeyer Avenue.

CHRISTIANO's background is discussed in paragraph 8D of my affidavit of August 15, 1972. INGLESE is known to the New York City Police Department under B# 298-481. He was arrested for Robbery in 1951, was convicted of a related offense and placed on probation; six months later he violated probation and was sent to Elmira Reformatory. In 1955 he was convicted of unlawful possession of drugs and sentenced to six months. In 1962 he was convicted of a

gambling law violation. In 1964 he was arrested for sale and possession of drugs and in 1965 for homicide; no dispositions are known as to the latter two arrests.

5G. *July 24, 1972.* At 6:30 p.m. I saw LENNY FILIPPONE arrive at 1023 Havermeyer Avenue, park, and enter; he left about two hours later.

At 9:15 p.m. a man unknown to me driving a car with license plates NNO 184 (New Jersey), pulled up, left the vehicle and entered the club. Twenty five minutes later JOHN CAPRA arrived and entered, remained inside about five minutes, and came out again. CAPRA went to the rear of the unknown man's auto, opened the trunk, and looked inside; I could not see whether he put anything into or took anything out of the trunk. CAPRA then closed the trunk, stood outside for a few minutes, and went back inside.

At about 10:;3 p.m. an unknown female walked up to and entered the premises carrying a large paper bag.

At 10:05 p.m. STEPHEN DELLA CAVA arrived, parked and entered. Surveillance was discontinued at 11:30 p.m.

5H. *July 26, 1972.* I am informed by Detective Michael Giovaniello that on July 26, 1972 he made the following observations in the vicinity of 1023 Havermeyer Avenue:

At 9:05 p.m. a male tentatively identified as DANIEL PANESSA arrived and entered the club.

At 9:10 p.m. LENNY FILIPPONE entered the club.

At 9:15 p.m. an unidentified male drove up in an auto bearing New Jersey registration number RYN 853, registered to one JOSE BLANCO of 113 James Street, Newark, New Jersey, and went inside.

At 9:30 p.m. JOHN CARUSO arrived and entered; five minutes later STEPHEN DELLA CAVA arrived and entered.

At 10:00 p.m. another unidentified man drove up and entered.

At 10:10 p.m. FILIPPONE left the club and drove away; he returned about ten minutes later carrying a brown paper bag, and re-entered the club.

FILIPPONE's brief trip may have involved a delivery of a quantity of narcotics—a half-kilogram or kilogram. The paper bag could thus have contained payment for this package.

It may therefore be quite significant that within twenty minutes of FILIPPONE's return, at about 11:30, everybody exited 1023 Havermeyer. This fact could indicate that the others were waiting for him to return with the money; once he had done so, the business of the evening completed, the others except for DELLA CAVA and CARUSO, got into their cars and drove away. The latter two men remained outside 1023 for a few minutes and then they, too, left.

5I. *July 27, 1972.* I am informed by Detective Frank DeMarco that on July 27, 1972 he observed MICHAEL CAPRA, DELLACAVA, and CARUSO present at 1023 Havermayer Avenue.

At about 10:00 p.m. an unidentified male arrived in a blue panel truck registered to ROBUST CONSTRUCTION COMPANY of 336 East 115th Street, and entered 1023 Havermeyer; shortly thereafter he and DELLA CAVA left the premises and got into the truck. They sat in the truck for about five minutes; then, as he got out of the truck, DELLA CAVA put an object into his left inner jacket pocket. DELLA CAVA got into his car and drove away; the truck driver also drove away.

5J. *July 31, 1972.* See paragraphs 7A and 7B of my affidavit of August 15, 1972. The events related therein

DELLA CAVA's phone call from and meeting with JOSEPH GERNIE initiated, in my opinion, negotiations for a purchase of narcotics which has not yet been completed.

6. *August, 1972.*

6A. *August 1, 1972.* At 10:35 p.m. DELLA CAVA arrived at 1023 Havermeyer Avenue, parked in the vicinity of the club, at that time also parked in the vicinity of the club were the vehicles usually driven by MICHAEL CAPRA and LEOLUCA GUARINO; among other vehicles in the area was an old van painted like a mail truck.

At 10:50 p.m. FILIPPONE left 1023 Havermeyer and drove away; at 11:00 p.m. MICHAEL CAPRA and JOHN CAPRA left.

I am informed by Detective Anthony Gustitus of the following: at 11:00 p.m. GUARINO left the premises, carrying a small brown paper bag. GUARINO approached the van mentioned above, and examined it for several minutes, looking at its exterior and *** are not infrequently used by law enforcement agencies as a camouflage from which to conduct "close up" surveillance; it is Detective Gustitus' opinion, and mine, that GUARINO examined the van to ascertain if this van was indeed being used for surveillance purposes. His curiosity apparently satisfied, GUARINO then got into his car and drove away.

At 12:15 a.m. DELLA CAVA left the club.

6B. *August 1, 1972.* See paragraphs 8A through 8F of my affidavit of August 15, 1972.

6C. *August 3, 1972.* See paragraph 9 of my affidavit of August 15, 1972.

After DELLA CAVA's conversation with GERNIE at 6 p.m., DELLA CAVA went up to 1023 Havermeyer Avenue

at about 10:05 p.m. Cars usually driven by JOHN and MICHAEL CAPRA, LENNY FILIPPONE, and one PETER "PETEY BONES" MOSCA were parked in the vicinity.

MOSCA is the apparent manager of the social club at 2034 Second Avenue, immediately next door to DELLA CAVA's bar and air conditioning store. MOSCA is known to the New York City Police Department under B# 485097 and has been arrested on eight (8) occasions for gambling violations from 1957 to 1966.

At 11:30 p.m. DELLA CAVA left 1023 Havermeyer and returned to his bar at 2034 Second Avenue, *an unusual event*; once he leaves the store and the bar in the evening, he rarely returns.

In my opinion DELLA CAVA went to 1023 Havermeyer to tell his associates there about the bad news he had gotten from GERNIE.

6D. *August 4, 1972.* See paragraph 10 of my affidavit of August 15, 1972 (another "bad news" phone call from GERNIE; another trip by DELLA CAVA to 1023 Havermeyer; etc.).

At about 10:35 p.m. — in between DELLA CAVA's two phone calls at 10:00 and 11:55 — FILIPPONE left 1023 Havermeyer and drove back about ten minutes later; an unknown male was in the passenger's seat of FILIPPONE's car.

FILIPPONE entered 1023 Havermeyer; his passenger remained in the car. FILIPPONE remained in the club, and the passenger remained in the car, for about twenty minutes; FILIPPONE then left the club and drove away with his passenger.

DELLA CAVA'S and FILIPPONE'S activities that evening were *quite possibly* related. Having investigated

DELLA CAVA for approximately ten months or more, it is my opinion that DELLA CAVA traffics in narcotics on two different levels: first, on a regular basis, he deals in "small" quantities—half-kilograms and kilograms; second, he acts as a "broker" for his associates and other groups in large, multi-kilogram transactions.

DELLA CAVA'S phone conversations and meetings with GERNIE involve this second category.

FILIPPONE, on the other hand, would more directly participate in the first, "smaller" type of deal. Assuming this to be the case, his trip from the club may have involved a negotiation *or delivery of a half-kilo or kilo.* The man with whom he returned *may* thus have been a *customer—a customer* who either could not make the required down payment or had complaints about the quality of narcotics involved. *Given these assumptions, FILIPPONE'S return to the club with the "customer" may have indicated that he needed to consult his superiors—DELLA CAVA, JOHN CAPRA, GUARINO*—as to what he should do; and given the delicate nature of such consultations, the "customer" would obviously have to wait outside.

Of course, without being able to overhear this conversation, or DELLA CAVA'S reports as to his conferences with GERNIE, *it is difficult to ascertain precisely what these people were discussing.*

Wednesday, August 16, 1972

6E. On August 16, 1972, at about 6:15 p.m., I and other detectives observed STEPHEN DELLA CAVA and JOSEPH GERNIE in conversation in the vicinity of 84th Street and Second Avenue, during this conversation, both GERNIE and DELLA CAVA frequently moved hands and arms. At one point during this conversation, Detective

Falvain DeBoissiere walked past, and heard GERNIE tell DELLA CAVA, *"Tell them they'll have to wait."* This repeats the theme GERNIE had been telling DELLA CAVA for almost two weeks: the narcotics is within reach, but cannot be moved or transferred yet.

Sometime after this was overheard, Detective Frank DeMarco observed DELLA CAVA and GERNIE talk to the rear of DELLA CAVA's vehicle; DELLA CAVA opened the trunk, removed something white, and handed it to GERNIE. Detective DeMarco informs me that the object was about the size of a business envelope.

This object might have continued a "down payment" from DELLA CAVA and his associates to GERNIE; it might have contained "bait"—it is not unheard of for narcotics traffickers to use "bait" of this sort to find out if they are being observed, by tempting any observing officers to make a summary street arrest. *Because the conversation could not be overheard, we could not ascertain precisely what that object was.*

GERNIE held the package in his hand for a few minutes, occasionally waving it, as he and DELLA CAVA spoke. Then he went to his own car, opened the door, and began to sit down inside; then GERNIE got into DELLA CAVA's car with DELLA CAVA and spoke to him for an additional few minutes.

*** conversation DELLA CAVA returned to his bar at 2034 Second Avenue, and remained there until about 9:35 p.m.

At 9:35 I followed DELLA CAVA from 2034 Second Avenue to 1023 Ravermeyer Avenue at the club were cars usually driven by JOHN CAPRA, LEOLUCA GUARINO, LENNY FILIPPONE and JOHN CARUSO. DELLA CAVA arrived at about 10:05 p.m.; at 11:00 I saw

GUARINO leave; at 11:20 I saw JOHN CAPRA leave; by 11:40 FILIPPONE's and CARUSO's cars were no longer in the area of the club. DELLA CAVA left at about 11:50, and drove toward his home.

It is my opinion that DELLA CAVA went to 1023 Havermeyer to relate the latest aspect of his negotiations with GERNIE. The men in the club apparently discussed what to do for about an hour, and then left. It is my opinion that being able to overhear conversations such as this one would represent a major breakthrough in this investigation.

6F. *Monday, August 28, 1972*

I am informed by Detective DeMarco and Special Agent Brent Eaton of the Federal Bureau of Narcotics and Dangerous Drugs that on August 29, 1972 they observed the following:

At approximately 4:30 p.m. the vehicles owned by JOHN CAPRA, MICHAEL CAPRA, JOHN CARUSO, STEPHEN DELLA CAVA, and one believed to be the Lincoln owned by LEOLUCA GUARINO, were parked in the vicinity of the social club located at 1023 Havermeyer Avenue, Bronx, New York.

At approximately 5:10 p.m. JOHN CAPRA and STEPHEN DELLA CAVA left the social club; at the same time a 1969 Chrysler, bearing New Jersey license plates, arrived. The driver was a male, white approximately thirty years of age; with black hair, wearing sunglasses and a passenger,

***

investigators were too far away to be certain. The male believed to be ZANFARDINO engaged DELLA CAVA in an apparently heated conversation. At this point JOHN CAPRA pushed all three—DELLA CAVA, the male believed to be ZANFARDINO, and the driver of the Chrysler—inside the social club and off the street.

Detective DeMarco and Agent Eaton tell me that the man they believe to be ZANFARDINO appeared to be very angry; CAPRA pushed him and DELLA CAVA inside, they feel, because CAPRA feared the argument might be overheard and that the nature of the conversation was such that it might place all of them in jeopardy if anyone overheard it. It is my opinion, Detective DeMarco's and Agent Eaton's that the topic of this conversation was narcotics. The vehemence of the argument was such that it was undoubtedly continued within the walls of 1023 Havermeyer; had we been able to overhear this conversation, considerable evidence of narcotics-related activity probably would have been overheard.

Tuesday, August 29, 1972

7. I am informed by Special Agent Brent Eaton of the following:

At 8:30 p.m. FILIPPONE, JOHN and MICHAEL CAPRA, DELLA CAVA, and GUARINO were parked in the area of 1023 Havermeyer Avenue.

At 9:05, DELLA CAVA left the club; Patrolman John Bruno followed him to the vicinity of the Triborough Bride—F.D.R. Drive interchange, where he was lost sight of.

I am informed by Special Agent Dennis Nargi that at about 9:30 p.m. he saw DELLA CAVA apparently checking the locks at his air conditioning store; he then entered his bar next door, 2834 Second Avenue, where he remained for about two minutes: He then got back into his car and

*** where he was lost from view.

Special Agent Eaton further informs me that a man driving a car registered to EDWARD MADEEN of Rutherford, New Jersey, arrived and entered the club at 1023 Havermeyer at 9:45 p.m.

Special Agent Laton further informs me that at 10 p.m. DELLA CAVA returned to 1023 Havermeyer.

It has been my experience that the drive from 1023 Havermeyer to the air conditioning store takes half an hour each way. DELLA CAVA therefore could not have spent more than a very few minutes at his store and bar on Second Avenue before agent Nargi saw him at about 9:30. The purpose of DELLA CAVA's trip is not known; had we been able to overhear conversations inside 1023 Havermeyer, the reason for this unusual trip may have been learned.

7B. I am informed by Detective Hauwens of the New York Joint Task Force that he observed the following:

MICHAEL CAPRA left the club at 10:50 p.m. apparently empty-handed and drove north on Castle Hill Avenue, running two red lights enroute; he turned left onto the Cross-Bronx Expressway, where he was lost from view.

At 10:40 p.m. the man who had driven MARSON's car left the club carrying a large shopping bag, and he drove to "TOM SWIFT's RESTAURANT," in Fort Lee, New Jersey. (He was followed there by Special Agents Nargi and McGinn.

I am informed by Special Agent McGinn that he observed the following:

The driver of MADSON's car entered the restaurant—whether he disposed of the shopping bag before entering, took it with him, or left it in the car is not known—and engaged two men in conversation inside the restaurant, at which point surveillance was terminated.

7C. I am informed by Detective Nauwens of the following:

At 12:50 a.m. JOHN CAPRA left 1023 Havermeyer and drove away.

At 12:55 a.m. GUARINO, DELLA CAVA, MICHAEL CAPRA, and GENNARO ZANFARDINO left 1023 Havermeyer (I do not know at this time if anyone had saw when ZANFARDINO had arrived).

MICHAEL CAPRA left the club empty-handed.

GUARINO left carrying a suitcase which he placed in the trunk of his car. DELLA CAVA then locked the door to 1023 Havermeyer and then shook hands with ZANFARDINO, and the two men laughed.

MICHAEL CAPRA and GUARINO entered their cars and drove away; ZANFARDINO and DELLA CAVA walked towards Bruckner Expressway. GUARINO was not followed—if officers had done so, they might have been noticed by ZANFARDINO and DELLA CAVA.

I am informed by Special Agent McGinn that at 1:45 a.m. he saw GUARINO's car parked in the vicinity of his home in Melville, Long Island; this indicates that GUARINO probably went straight home.

7D. Since we were not able to overhear what went on inside the club between DELLA CAVA and the man believed to be ZANFARDINO on the afternoon of August 28, (paragraph 8F below), nor what transpired between DELLA CAVA, SANFARDINO, MICHAEL CAPRA, GUARINO, and the man driving MADSOS's car on the 29th—30th, it is difficult to ascertain precisely what these events add up to. However, based on my experience in investigating this group, I have arrived at these tentative conclusions:

The man DELLA CAVA argued with on August 28, 1972 was in fact ZANFARDINO; and ZANFARDINO was angry because he had expected a delivery of *** from SDC and DC was to deliver. JOHN CAPRA Pushed them inside the club, they calmed down and DELLA CAVA

promised to try to assure delivery by the following night.

ZANFARDINO probably arrived at 1023 Havermeyer Avenue before observations were begun on the 29th, and arrived on foot. It is my feeling that he may have brought with him the suitcase referred to in paragraph C, above.

DELLA CAVA's quick trip from the club in the Bronx to his store and bar in Manhattan and back may have involved last-minute arrangements in the ZANFARDINO narcotics transaction.

By about 10 p.m. all of the principals in the transaction were present in the club: DELLA CAVA, GUARINO and MICHAEL CAPRA, on the one hand; ZANFARDINO and the man driving MADSON's car, on the other.

At 10:50 MICHAEL CAPRA left to pick up the narcotics—running two consecutive red lights, so it would be impossible for anyone to follow him without making it obvious that he was being followed:

He returned a half-hour later, with a fairly large amount of narcotics—large enough for the weight of it to be noticed.

Twenty minutes after MICHAEL CAPRA returned with the narcotics—just about enough time to conclude negotiations—the man driving MADSON's car left the club; with the shopping bags and with the narcotics that MICHAEL CAPRA had brought. This man drove to the restaurant in Fort Lee to confirm with his customers that he had obtained the drugs.

The men inside the club—DELLA CAVA, GUARINO, JOHN and MICHAEL CAPRA, and ZANFARDINO—waited an hour or so. During this period of time the money—the contents of the suitcase—was transferred to GUARINO. (This would not be the first time that Guarino was involved in the task of handling the payment for a

narcotics transaction arranged by DELLA CAVA—see paragraph 7 of my affidavit of June 9, 1972 relating the events of February 3, 1972.)'

Shortly before 1:00 a.m. everybody left the club—MICHAEL CAPRA empty-handed, GUARINO with the suitcase and money, DELLA CAVA and ZANARDINO friends again, a narcotics transaction completed, with the money in GUARINO'S possession and the narcotics with the driver of MADSON'S car, the man for whom ZANFARDINO had arranged the deal.

Everything related in this paragraph 7D is opinion, opinion based on facts, on experience, based on lengthy investigation of and study into STEPHEN DELLA CAVA and his associates. If electronic eavesdropping devices had been in 1023 Havermeyer Avenue on August 28, 1972 through August 30, 1972, I am of the opinion that several pounds of narcotics would have been seized and STEPHEN DELLA CAVA, JOHN CAPRA, MICHAEL CAPRA, LEOLUCA GUARINO, GENNARO ZANDEINO and the man driving MADSON'S car would now be in custody charged with criminally possessing and/or selling dangerous drugs in the first degree.

8. During the course of this investigation, I have personally received information from a confidential informant. His name has been withheld from this affidavit in order to protect his identity and to insure his personal safety. His identity has been devulged to the Court.

On August 21, 1972, August 23, 1972 and August 25, 1972, I interviewed the informant extensively and obtained the following information:

That he personally knows that STEPHEN DELLA CAVA, LEOLUCA GUARINO, JOHN CAPRA, MICAHEL CAPRA and LENNY FILIPPONE operate a large narcotics combine in the metropolitan area.

That JOHN CAPRA is the "boss" of this combine. That JOHN CAPRA directs DELLA CAVA through GUARINO in the routine operation of this combine. That MICHAEL CAPRA and LENNY FILIPPONE are couriers for the *** STEPHEN DELLA CAVA in personal possession of narcotics, during the winter of 1971-72. On that condition JOHN CAPRA entered Dianes Bar, 2039 Second Avenue (secretly owned by ** carrying a plastic bag containing narcotics which had broken open. The informant observed DELLA CAVA and CAPRA rewrap the plastic bag and its contents in a newspaper. CAPRA then left the bar.

The informant states that on several occasions he has heard DELLA CAVA, GUARINO, JOHN and MICHAEL CAPRA and LENNRY FILIPPONE discuss their narcotics business in the above mentioned bar and in Stephen's Air Conditioning and T.V. Repair, 2036 Second Avenue. He has also heard the above mentioned people say that they would continue their discussion of narcotics at the social club, 1023 Havermeyer Avenue, later that evening.

The informant further states that he has seen LOUIS "GIGI" INGLESE leave a large amount of money for DELLA CAVA with the bar tender at Dianes Bar, 2034 Second Avenue. He also states that he has seen DOMINICK "SHORTY" ALLOCCO give money to DELLA CAVA, which was the proceeds of narcotics transacting. He also states that he has seen JOHN "JOHNNY ECHOES" CAMPOPIANO, GENNARO ZANFARDINO, MURAD "THE ARAB" NERSHESIAN, and JOSEPH GERNIE in conversation with DELLA CAVA. The informant states all of the above individuals are involved in the supplying of, or the distribution of narcotics, as associates of DELLA CAVA, GUARINO and CAPRA.

The informant has told me of the location of a trap, used

for secreting narcotics inside Dianes Bar, which until the arrest of DELLA CAVA and GUARINO on February 3, 1972 contained approximately fourteen large packages of narcotics. The informant further states that since the arrest, no narcotics are stored in the bar and only occasionally pass through the air conditioning store during shipment, most transactions and negotiations are taken care of, or at least begin inside the social club on Havermeyer Avenue.

The informant further states that within the last six weeks he has been inside the social clubs on Havermeyer Avenue. On one of these occasions, with DELLA CAVA and GUARINO present, two white males, unknown to him, entered the club and divided a kilogram of heroin into two half kilograms, leaving one half in the original plastic bag and rewrapping the other half in aluminium foil and then left the club.

The informant states that DELLA CAVA is the "hub" of many narcotics transactions. Further the informant states that DELLA CAVA has access to large quantities of narcotics.

The informant states that he has seen LOUIS CIRRILLO, an importer, come to the bar and talk to DELLA CAVA.

9. I respectfully submit that the information contained in this affidavit establishes probable cause to believe that; STEPHEN DELLA CAVA (see paragraphs 5A through 5J, 6A through 6F, 7A, 7C and 7D), MICHAEL CAPRA (see paragraphs 5B through 5F, 5I, 6A, 6B, 6C, 6F and 7A through 7G), JOHN CAPRA (see paragraphs 5A, 5B, 5D through 5G, 6A through 6F, 7A and 7B), LEOLUCA GUARINO (see paragraphs 5E, †f, 5J, 6A, 6B, 6C, 6E, 6F, 7A, 7C and 7B), and LENNY FILIPPONE (see paragraph 5C through 5H, 6A, 6C, 6D, 6E and 7A) have been and are

continuing to engage in the crimes of criminal possession of a dangerous drug as a felony and criminally selling a dangerous drug as a felony, in violation of Article 820 of the Penal Law, both of which are crimes punishable by imprisonment for more than one year.

I further respectfully submit that the information contained herein establishes probable cause to believe that DELLA CAVA, JOHN and MICHAEL CAPRA, GUARINO and FILIPPONE have other co-conspirators, accomplices, agents, suppliers, deliverers and customers in the commission of said crimes.

I further respectfuliy submit that the information contained herein establishes probable cause to believe that these five individuals and their co-conspirators accomplices, agents, suppliers, deliverers and customers discuss, negotiate and transact narcotics purchases and sales inside the ground floor of the premises 1025 Havermeyer Avenue, Bronx, New York.

I further respectfully submit that the information contained *** these five individuals with each other and with their co-conspirators, accomplices, agents, suppliers, deliverers and customers inside said premises will constitute evidence of said crimes.

10. Authorization is therefore sought to enter the premises 1023 Havermeyer Avenue and to place in the ground floor of said premises electronic eavesdropping devices. The conversations sought to be overheard, specifically are conversations of STEPHEN DELLA CAVA, JOHN CAPRA, MICHAEL CAPRA, LEOLUCA GUARINO and LENNY FILIPPONE WITH EACH OTHER and with their co-conspirators, accomplices, agents, suppliers, deliverers and customers, pertaining to illegal traffic in narcotics.

The interception of such conversations is essential if

STEPHEN DELLA CAVA, JOHN CAPRA, MICHAEL CAPRA, LEOLUCA GUARINO and LENNY FILIPPONE and their co-conspirators, accomplices, agents, suppliers and customers are to be successfully prosecuted. It is only by the interception of such conversations that it will be possible to identify their co-conspirators accomplices, agents, suppliers and customers; to learn when and where DELLA CAVA, JOHN and MICHAEL CAPRA, GUARINO and FILIPPPONE will be meeting with these other individuals to conduct narcotics transactions, so that surveillance can be maintained on these meetings and transactions; most important to apprehend DELLA CAVA, JOHN and MICHAEL CAPRA, GUARINO and FILIPPONE and/or one or more of their co-conspirators, accomplices, in possession of narcotics and in the act of selling narcotices.

11. I am not in possession of any information which would indicate that any of the conversations sought to be intercepted and overheard may be expected to come within any privilege under any applicable rule of law.

12. This investigation has been ongoing since the latter part of September, 1971, and for the reasons detailed above, it has been impossible to accumulate sufficient evidence against STEPHEN DELLA CAVA, JOHN and MICHAEL CAPRA, LEOLUCA GUARINO, LENNY FILIPPONE and their co-conspirators, accomplices, agents, suppliers, deliverers and customers through normal investigative techniques and procedures to have them prosecuted. It is impossible to use an informant or an undercover officer to gather further evidence and information in these matters.

Under these circumstances, I respectfully request that an order in the annexed form be issued by the Court.

13. The evidence detailed in the above paragraphs indicates that it is not possible to predict with certainty what particular time of day the above-described conversations may take place.

It is therefore respectfully requested that the annexed eavesdropping warrant be effective for a period of thirty days from the effective date and at any time during the day or night.

14. Given the nature and location of the premises 1023 Havermeyer Avenue, it may prove difficult to place the eavesdropping devices inside the rooms of the ground floor of said premises; it will be necessary to choose the right day and time to place the devices, to assure that we are not observed doing so. It is therefore respectfully requested that this order shall be effective on the day and at the time that placement and connection of said devices inside said premises completed; but that in no event will be effective date of this order be any later than seven (7) days after the issuance of this order.

As soon as practicable, proof by affidavit of the completion of said placement and connection will be made to the Judge or Justice to whom this application is being made.

15. It is further requested that this order for interception not automatically terminate when the above-described type of communication has been first obtained. Considering the continuing nature of the criminal activity involved herein, it is important that the interception of conversations not terminate after the first conversation concerning narcotic drugs has been intercepted.

To my knowledge, no previous application for the order requested herein has been to any other Court or Justice.

s/ George Eaton
GEORGE EATON

Sworn to before me this
8th day of September, 1972
s/ Hyman Katz
HYMAN KATZ
Notary public, State of New York
No. 03-2044330
Qualified in Bronx County
Certificate Filed in N.Y. County
Term Expires March 30, 1973

s/
Justice of the Supreme Court

APPENDIX I

EXTENTION OF EAVESDROPPING WARRANT

(TITLE)

It appearing from the affidavit of Frank S. Hogan, District Attorney of the County of New York, and the accompanying affidavit of Detective George Eaton, of the Special Investigations Unit, Narcotics Division, Organized Crime Control Bureau, New York City Police Department, said affidavits having been submitted in support of this eavesdropping warrant and incorporated herein as a part thereof, that the installation required for the execution of the above-captioned order, issued by the Court on September 11, 1972, was completed on September 19, 1972, and that the 30-day period allowed by said order therefore runs from September 18, 1972 to and including the 17th day of October, 1972; and that there is probable cause to believe that evidence of the crimes of criminal possession of a dangerous drug as a felony and criminal sale of a dangerous drug as a felony, in violation of Article 220 of the Penal Law of the State of New York, may continue to be obtained by overhearing, intercepting and recording the conversations of STEPHEN DELLA CAVA, JOHN CAPRA, MICHAEL CAPRA, LEOLUCA GUARINO, and LENNY FILIPPONE with each other and with their co-conspirators accomplices, agents, suppliers, deliverers, and customers pertaining to illegal traffic in narcotics, inside the ground floor of premises 1023 Havermeyer Avenue, Bronx, New York, and the Court being satisfied that comparable evidence for the prosecution of said crimes could not be obtained by other means, it is

ORDERED, that the District Attorney of the County of New York, or any police officer acting under his direction,

is hereby authorized and empowered to continue to utilize within said premises electronic eavesdropping devices to overhear, intercept and record the conversations within said premises of STEPHEN DELLA CAVA, JOHN CAPRA, MICHAEL CAPRA, LEOLUCA GUARINO, and LENNY FILIPPONE with each other and with their co-conspirators, accomplices, agents, suppliers, deliverers and customers pertaining to illegal traffic in narcotics relating to the above-mentioned crimes; and it is further

ORDERED, that the agents and employees of the New York Telephone Company are directly constrained not to divulge the contents of this order nor the existence nor the presence of electronic eavesdropping devices inside said premises, nor the use of its lines and facilities in the execution of this Order to any person, including but not limited to the owners, lessors, lessees, tenants, residents, users or occupiers, of said premises or subscribers of said premises, facilities or equipment, whether or not the said owners, lessors, lessees, tenants, users, occupiers or subscribers of said premises, facilities or lines request that said premises, facilities or lines be checked for the existence of said electronic eavesdropping equipment; and it is further

ORDERED, that this order shall be conducted in such a way as to minimize the interception of communications not related to the aforementioned crimes and that nothing herein contained shall be construed as authorizing the District Attorney or his agents to intercept or overhear any communications of STEPHEN DELLA CAVA, JOHN CAPRA, MICHAEL CAPRA, LEOLUCA GUARINO, or LENNY FILIPPONE which are otherwise privileged and it is further

ORDERED, that this order shall be executed as soon as practicable and shall be effective from the 18th day of

October, 1972, at any hour of the day or night, and shall continue until evidence as described in the aforementioned affidavits shall have been obtained, and said authorization shall not automatically terminate when the communications described herein have first been obtained, but in no event to exceed thirty (30) days from said effective date, i.e. November 16, 1972.

Dated: New York, New York
October, 18th 1972

s/
J.S.C.

(TITLE)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

FRANK S. HOGAN, being duly sworn, deposes and says:

1. I am the District Attorney of the County of New York, and as such make this affidavit in support of an application for an order authorizing the placement and use of electronic eavesdropping devices.

2. I have read the affidavit of Detective George Eaton, assigned to the Special Investigations Unit, Narcotics Division, Organized Crime Control Bureau, New York City Police Department.

3. Based upon the facts set forth in that affidavit, I respectfully submit to the Court that there is probable cause to believe that essential evidence of the crimes referred to therein has been and shall continue to be obtained by the continued use of electronic eavesdropping devices in the above-named premises to overhear, intercept and record the conversations described above.

4. In my opinion, there are no alternative investigative techniques or procedures that could be used to acquire the essential evidence necessary to prosecute successfully the violators of the crimes described therein. I believe that the nature and scope of the criminal activities involved is of sufficient importance to warrant the employment of electronic interception devices.

WHEREFORE, it is respectfully requested that the annexed extention of this eavesdropping warrant be issued and made effective from the effective date, October 18, 1972, until and including the 16th day of November, 1972.

No previous application for the relief sought herein has been made to any other court or justice.

s/Frank S. Hogan
FRANK S. HOGAN

Sworn to
October 18th, 1972

(TITLE)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

GEORGE EATON, being duly sworn, deposes and says:

1. I am a detective in the New York City Police Department, assigned to the Special Investigation Unit of the Narcotics Division, Organized Crime Control Bureau, and I am presently conducting an investigation to determine whether certain crimes of Criminally Possessing a Dangerous Drug as a Felony and Criminally Selling a Dangerous Drug as a Felony, both of which are crimes in violation of Article 220 of the Penal Law and are punishable by imprisonment for more than one year, have been and are being committed by STEPHEN DELLA CAVA, JOHN CAPRA, MICHAEL CAPRA, LEOLUCA GUARINO, and LENNY FILIPPONE, with each other and with their co-conspirators, accomplices, agents, suppliers, deliverers, and customers in and about the County and City of New York.

2. I have been a member of the New York City Police Department for approximately nine years. I have participated in more than one hundred narcotics arrests and in investigations involving several previous eavesdropping warrants.

3. This affidavit is submitted in support of New York County District Attorney Frank S. Hogan's application for an extention of the above-captioned eavesdropping warrant, which was issued by the Honorable Irving Lang, Justice, Supreme Court of the State of New York, on September 11, 1972.

4. I am informed by Detective Thomas Ward, S.I.U.—O.C.C.B., N.Y.C.P.D. that preliminary difficulties were

encountered in installing the "bugs" and making them operational; and that we were not able to intercept and record conversations until approximately 1 p.m. on September 19, 1972.

During the first weeks of operation, an additional problem arose: whenever the named subjects entered the premises and conducted discussions, the television set in the club would be turned on, with the volume turned quite high, making it difficult at times to ascertain who was saying what to whom. However, improvements have since been made on our equipment, and this problem has been largely overcome.

5. During the past weeks, evidence has been obtained via the eavesdropping which indicates that DELLA CAVA, GUARINO, JOHN CAPRA, and others engaged in narcotics sales in the past, are continuing to do so in the present and hope to do so in the future.

However, the conversations overheard also demonstrate that they have had difficulties obtaining narcotics in the quantity and of the quality which they are accustomed to handle. "There's no dope," DELLA CAVA complained at one point, and GUARINO expressed concern about "the headlines if you're handling dope today."

Nor is the scarcity of narcotics restricted to DELLA CAVA, GUARINO, the CAPRA's and their associates. There is a "panic in the streets" throughout the city and the east coast. I have been told as much by other narcotics investigators who agree that drugs are currently very scarce, and the price for narcotics is skyrocketing. John Ingersoll, regional director of the Federal Bureau of Narcotics and Dangerous Drugs, has also commented publicly about the remarkable degree and duration of the "panic"—a panic caused, in his opinion, by the dramatic increase in law enforcement activities and investigations in the narcotics field.

The narcotics traffickers are apparently "feeling the heat."

This is not to say that our subjects and their associates are dropping out of the narcotics business; far from it. They are reaching out to as many sources as possible for drugs; they are trying to placate their customers. But the evidence gathered during the past month demonstrates that they realize that they will have to be satisfied with small transactions here and there until the "panic" eases and the large quantities of narcotics become available to them again.

6. On October 2, 1972, a conversation was overheard which in my opinion strongly connects GUARINO, DELLA CAVA, CAPRA and others to several kilograms of heroin and cocaine which were seized in the Toledo, Ohio, in November, 1971. The background of the Toledo seizure has been told to me by a detective who worked on that investigation and is now working on this one.

6A. I am informed by Detective James Nauwens of the following:

I am a detective in the N.Y.C.P.D. currently assigned to OCCB and the ODALE. From October, 1970 to September, 1972 I was a participant in an investigation, while assigned to the New York Joint Task Force, which investigated the activities of JOAQUIN "IGNNY" RAMOS, ROBERT "BOBBY" JERPHIN, ALAN FORHIS, also known as "UNDERWORLD", HAROLD MCFADDAN and others.

"This investigation culminated in the arrests of RAMOS, MORRIS, MCFADDEN and one other for possession of approximately 6 kilograms of heroin and 1 kilogram of cocaine in the Union (train) Station in Toledo, Ohio, in November, 1971. "The evidence in that case involved, in part, photographs which I had taken showing

RAMOS, MORRIS, MCFADDEN and others seated together at Madison Square Garden at the MUHAMMAD ALI-OSCAR BONAVINA fight in December, 1970.

"I am informed by MEL RESNICK, of the Lucas County, Ohio Prosecutors Office, that the testimony at the trials of MORRIS, MCFADDEN, and RAMOS established the following:

"In November, 1971, RAMOS went to the Union Station and checked a suitcase. Shortly thereafter he got into a discussion with a cab dispatcher at the station and told the dispatcher that his auto was sick and he had to return to New York.

"A few days later MORRIS, MCFADDEN and one other went to the train station and retrieved the suitcase; at this point they were arrested. The suitcase contained approximately 6 kilograms of heroin and 1 kilogram of cocaine.

"In August of 1972 I testified in Toledo at the trial of MCFADDEN, MORRIS and the other individual. They were all convicted of possession of the narcotics and related crimes.

"In the last week of September, 1972, I testified in Toledo at the trial of JOAQUIN "JOHNNY" RAMOS. Part of my testimony concerned the Madison Square Garden photograph. RAMOS too, was convicted of possession of narcotics; the trial lasted about ten days.

"I am informed by Mr. Resnick that the first witness he called in the RAMOS trial was the gentleman with whom RAMOS had checked the suitcase at the Union Station in Toledo. I am further informed by Mr. Resnick that Union Station is an old ancient-looking building and is not at all a busy station; relatively few trains stop there, relatively few passengers utilize it."

6B. On October 2, 1972, between 9:30 p.m. and 11:15 p.m., conversations were overheard and recorded between STEPHEN DELLA CAVA, LEOLUCA GUARINO, JOHN CAPRA and an unknown male. These conversations included:

LEO: The fucking agent out there—inaudible—

JOHN: They want, him bad, they want him bad, there's a Grand Jury on him, they're going to bring Johnny down, they're going to bring the witness down cause of the luggage case. (inaudible) The three agents from New York, — takes ten days to work the whole trial, the fucking courts from out there — and the department out there, ten days in the fucking courtroom. He says the first witness, they're going to call was the guy from the bag — inaudible — as soon as he got on the stand — inaudible — the guy was convicted. (Inaudible) they let in more fucking shit, they let in the cases, they let in the pictures from Madison Square Garden. They only had six things, six fucking, ah, six pieces of evidence, four more to connect, and the two they had for the conspiracy with the pictures and the tickets, which is nowhere near enough, because in the picture you don't see them talking to each other. You just see them sitting there, that's not enough for conspiracy. . . . He's got to be guilty now what thing — inaudible -- you know he gave the guy his right name, you know he told the guy his fucking name, gave it to him. The guy, the guy asked him for change, he told the guy to make reservations for him on the flight and every fucking thing — Mike believes the guy is the biggest fucking moron in the world. He talked to the guy for a half an hour. Talked to him, got to go to New York, my aunts sick — inaudible — (FOR

ABOUT TWO MINUTES) There's no way they can connect Bobby with the photographs — inaudible — who the fuck was it — Bobby — inaudible — What kind of a move, do, do you use then he gave his right fucking name Fuck it. Johnny comes over to me — with this fucking place. It looks like 1885, did you ever see the fucking train stops they have — that's the fucking place, that's the fucking thing, that's what it is, nobody, nobody there, and fucking train takes about six people a week.

LEO: Then what the fuck did he have to go to Toledo for? Do you know what's with this guy?

STEVE: No. We told him to go.

LEO: We didn't tell him to go to Toledo.

STEVE: Yes we did, yes we did.

JOHN: The next town, we told him to go there.

STEVE: Right.

JOHN: Tell him to go, he's supposed to go there, well who the fuck -- Toledo sounded big to us.

STEVE: I thought it was a big town. What the fuck did we know, we didn't know that.

JOHN: The guy ain't got no fucking brains.

MALE: It's our fault Leo. You what it boils down to, we gave a guy a fucking, ah chance and he wasn't, ah fucking smart enough. If that was you or me, somebody else, we would of — inaudible —

JOHN: This guys main thought was getting it, dropping it and running away.

6. I am informed by Detective Nauwens of the following:

"It is my opinion that this conversation, was about the RAMOS-MCFADDEN-MORRIS case, and particularly the RAMOS trial.

"This opinion is based upon the following factors:

1. RAMOS was convicted in the last week in September. This conversation occurred on October 2nd.

2. CAPRA's source of information about the trial they are discussing is "Mike" —probably, in my opinion, Michael Santangelo. (Mr. Santangelo has represented DELLA CAVA and GUARINO in the past)

3. The trial lasted roughly ten days.

4. The first People's witness was "the guy from the bag" — the man with whom RAMOS checked the suitcase.

5. I testified about the Madison Square Garden photographs, which were introduced into evidence.

6. RAMOS spoke to the cab dispatcher at length, mentioning that he had to go back to New York because of a sick relative.

7. "BOBBY" JERMAIN was in the photographs which I took; but I did not testify as to who he was, since he was not a party to either of the trials. (There's no way they can connect Bobby with the photographs" may be an assumption on CAPRA's part that because we didn't, we can't.)

8. The Union Station is an ancient building ("looks like 1835"), and is not heavily used ("nobody, nobody there, the fucking train takes about six people a week").

9. DELLA CAVA, CAPRA, and GUARINO all make it clear they are discussing the train station in, and a trial which has just occurred in, TOLEDO."

6D. I share Detective Nauwens', opinion.

Considering that DELLA CAVA stated, "WE TOLD HIM TO GO" (Emphasis added); that CAPRA stated, "The next town, we told him to go there; and that the UNKNOWN MALE stated, "We gave a guy a . . . chance

and he wasn't . . . smart enough."

DELLA CAVA, CAPRA, the UNKNOWN MALE, and GUARINO have thereby implicated themselves quite strongly in the possession, transfer and sale of several kilograms of heroin and cocaine, and of conspiracy to commit those crimes.

7. Later in the evening of October 2, 1972, a conversation between JOHN CAPRA, STEPHEN DELLA CAVA, LEOLUCA GUARINO, and an UNKNOWN MALE was intercepted at about 11:05 p.m. which included:

> UNKNOWN MALE: Nobody wanted it so we asked 15 for it. We could have did fifty more if we had it.
>
> GUARINO: Jeeze why don't you get me 42. I got a guy a guy that could—I got a guy that could take 54.
>
> UNKNOWN MALE: This is it, this is it. This is better than work.
>
> CAPRA: This is for junkies only though Leo so you can't have it.

Given the scarcity of narcotics discussed in paragraph 5, above, this conversation demonstrates, in my opinion, that someone with a sizeable quantity of narcotics is in a position to command extremely high prices.

Thus when the UNKNOWN MALE said "Nobody wanted it, so we asked fifteen for it. We could have did fifty more if we had it," he was saying that he was able to sell narcotics at $15,000 per half-kilogram—an extremely high price—and could have sold an additional fifty half-kilograms, at the same price, if he had had the narcotics available.

GUARINO agreed: ". . . why don't you get me 42. I got

a guy that . . . could take 54."

Prices are so high now that "this is better than work," according to the unknown male, even though, as CAPRA notes, the narcotics is of relatively low quality: "This is for junkies only, though . . . "

A few seconds later, the conversation included:

> DELLA CAVA: —There's no dope—100 million dollars—
>
> GUARINO: That's shear fucking garbage.—can-see the headlines if you're handling dope today—
>
> DELLA CAVA: They got Turkey to stop—they put 2,000 agents, he got Marseilles to work with him. He got, got—he's stopping the Portuguese, he's spent 4 million-400 hundred million dollars this year in order to stop the junk that's why we need Nixon for President. This is the fucking—apologizing this is gonna be his biggest attack the fucking ah-plague, it's junk he's got them lots of records to back him up.
>
> GUARINO: What do you want me to do, take on "Big Mo"

DELLA CAVA and GUARINO are here expressing certain political opinions, crediting the Nixon administration with reducing the flow of narcotics into the United States—although from their point of view, "crediting" may not be an appropriate term to use. GUARINO comments plaintively, "What do you want me to do—take on "Big Mo?"—which may have been a reference, for example, to the U.S. Missouri, and by analogy, to the United States government.

8. Several of the discussions intercepted involved JOHN "JACK" BROWN.

The relationship between DELLA CAVA, GUARINO and BROWN has been discussed at length in previous affidavits.

8A. December, 1971 thru February, 1972—See paragraph 7 of my affidavit of 6/9/72.

8B. June, 1972—See paragraphs 7B through 7G of my affidavit of July 12, 1972. 8C. July, 1972—See paragraph 6C of my affidavit of August 15, 1972.

8D. On September 13, 1972, BROWN was arrested by Patrolman Lamendola, New York Police Department, on a charge of possession of four loaded guns (265.05); among other things.

8E. On 9/19, at about 8:30 p.m. DELLA CAVA made a phone call from this air conditioning store to an individual tentatively identified as "JOHNNY", the conversation included:

> DELLA CAVA: " . . . you know that guy? . . . my friend, the west side guy . . . Well, he's got to see you. . . . could you make it for Sunday morning?
>
> "IZZO": . . . Yeah, I think so."

DELLA CAVA and "NICKY" then agreed that "IZZO" would meet DELLA CAVA at about 12:30 the next day so DELLA CAVA would "let you know where to go."

The number DELLA CAVA dialed to speak to "IZZO" was 516-437-3415. According to the N.Y. Telephone Company, this number is registered to NICOLA IZZO, 873 Court Row, Franklin Square, Long Island.

8F. On 9/19/72, at about 11:15 p.m. a conversation between DELLA CAVA, GUARINO and JOHN CAPRA was overheard at 1023 Havermeyer Avenue. As discussed in paragraph 4, above it was difficult to make out some of what was being said. However, the following was heard:

GUARINO: . . . Jack's a friend of mine. I swear to God, this fucking Jack, I'll go up against anybody almost for him.

In the context of the conversation and previous dialings, "JACK" was in my opinion a reference to BROWN.

8G. I am informed by Special Agent Brent Eaton, F.B.N.D.D., of the following:

Late on the morning of 9/20 he observed a Male, White, about 57", about 180 pounds, wearing black glasses, leave 873 Court Row, Franklin Square, L.I. and enter a 1968 Chevrolet, registered to NICOLA IZZO, at 873 Court Row, Franklin Square, L.I.. This male drove to the Grand Central Parkway to the LaGuardia Airport area, pulled off the parkway, and then lay down on the front seat of the car for about five minutes—an attempt, in Agent Eaton's Opinion, to *** male then drove to 2036 Second Avenue, where he met with DELLA CAVA.

8H. I am informed by Sgt. Bernard Gillespie, S.I.U.—O.C.C.B.—New York City Police Department of the following:

At about 11 a.m. on Sunday, September 24, 1972 this male left 873 Court Row and drove to Manhattan—again taking his five-minute "tail check" near LaGuardia. He then drove to the vicinity of 180 West End Avenue, parked, and entered 180 West End Avenue; Detective Michael DiSalvatore interviewed a civilian who told Det. DiSalvatore that "NICKY" entered apartment 20F—BROWN's apartment.

A few minutes later "NICKY" and BROWN left 180 West End Ave. together and drove to the vicinity of 346 West 56th Street and entered that building.

Sgt. Gillespie subsequently arrested BROWN in possession of a loaded .38 calibre revolver (reported stolen

from Danbury, Conn.) and $4,000.00 on his person and a bag he had been carrying.

Subsequent investigation led to apartment 4D, 346 West 56th Street, for which BROWN had the keys, and which BROWN told Sgt. Gillespie was an apartment he was "visiting". A search of that apartment revealed $35,579 in cash, approximately four ounces of cocaine, traces of heroin on various cutting implements, and about seventy pounds of mixing agents. Also recovered from the apartment were an additional 8 rifles, hand guns, and pen guns, a silencer, and ammunition for each, as well as evidence of other crimes.

8I. I am informed by Sgt. Gillespie of the following:

"In September 29, 1972, I observed a female who had told me she was Mrs. Brown inside Steve's Air Conditioning in conversation with DELLA CAVA. Mrs. BROWN was with another female who had an apparently full shopping bag with her. The two females then took a cab to 180 West End Avenue."

8J. On October 4, 1972, during the evening, a conversation was overheard between JOHN CAPRA, GUARINO, DELLA CAVA and a male. This conversation included:

> CAPRA: Hey Beans! How much is here?
>
> DELLA CAVA: The guy says—20.
>
> CAPRA: There's 18.
>
> DELLA CAVA: He says 20 like that—but, I'm not sure whether he said 18. I thought maybe he says 18—They ah 20 he gave me 18 there's 20—there's 18 there. I didn't get nothing Ah little ah little something to help ah—
>
> CAPRA: Do you wanna to wait till we get back what we paid!

MALE: INAUDIBLE.

DELLA CAVA: Ah inaudible—because ha Jack has hardships we gotta do the right thing—inaudible—last word $18,000.

GUARINO: Eighteen thousand!?—18 thousand a pound you gotta be crazy.

MALE: INAUDIBLE.

DELLA CAVA: He could be talking to the Fed's they gotta think he's crazy too—ha ha

In my opinion, this conversation relates to a narcotics transaction from GUARINO, DELLA CAVA, et al, to BROWN—probably subsequent to his arrest of September 24, 1972 possibly given to BROWN via the lady who was with Mrs. Brown on September 29 (paragraph 81).

DELLA CAVA let BROWN have "a pound"—probably of heroin—for $18,000. (Because of the "panic" referred to in paragraph 5, above, the price of heroin has risen drastically.) GUARINO and CAPRA *** what DELLA CAVA only got $18,000 and not $20,000 for the pound, and DELLA CAVA is obviously defensive about the deal. He reminds the others that "JACK" has Hardships"—a reference, in my opinion, to BROWN's most recent arrest and losses of cash—"we gotta do the right thing . . . " and when GUARINO still complains about the price, DELLA CAVA reminds them of another reason to help BROWN out: "He could be talking to the Feds . . . " In other words, keep BROWN happy; otherwise he may decide to turn informant.

9. On October 10, 1972 at approximately 5:30 p.m. a conversation was overheard at 1023 Havermeyer. The participants to this conversation were JOHN CAPRA, GUARINO; an unknown male; and LOUIS "GIGI" INGLESE. The following is the essence of that conversation; while it is not a word-for-word transcript, I

prepared it after listening to the tape several times.

CAPRA: . . . come to New York, then take off for Chicago; had to go back to Europe instead of going to, say, Philadelphia or something.

INGLESE: You should of let it go.

GUARINO: It hadda go back.

INGLESE: He should have followed the plane and waited till it comes back.

GUARINO: Go back with it.

INGLESE: You mean when he went to get the stuff? You mean the stuff was up there?

UNKNOWN: Yeah.

CAPRA: The guy was afraid to let the plane go back to Europe.

UNKNOWN: That's true.

CAPRA: The plane came to New York, right, he got off the plane, you know, the same plane, somebody else gets on, takes the fucking thing right off. New Orleans, or Chicago, walk out with it, no problems, no nothing.

UNKNOWN: You had all the flights schedules.

CAPRA: But that day the fucking plane was a cancellation and rerouted back to France, the fucking jerk—off got scared, and he says "Go get it"— (inaudible).

UNKNOWN: Well, you don't know (inaudible)

CAPRA: It costs me a hundred dollars, a hundred dollars

. . .

In my opinion, they were discussing an importation of narcotics which aborted.

Smugglers have been known in the past to use multi-city international flights as one method of bringing narcotics into the country. At the flight's point of origin, a passenger

or airline employee brings a quantity of narcotics onto the plane with them and hides it somewhere on the plane (e.g. the men's room). When the plane arrives in New York City, the passengers and their belongings are subject to a customs search, but the planes themselves are not searched.

The passenger leaves the plane; but a co-conspirator of the smuggler gets on the plane and flies on to it's next destination— Chicago, New Orleans, Philadelphia or whatever. During this flight he removes the narcotics from its hiding place and departs the plane with it, free of any customs search.

The above conversation sounds to me like CAPRA is discussing just such an arrangement, which misfired when the second leg of the flight was cancelled and the plane had to return to France—with "the stuff" still "up there." They went on to discuss an alternative method of bringing the "package" in: Having it hidden in a car in Italy and shipping the car to the United States. They then discussed immunisation shots and immigration procedures, the costs of having a car imported, etc. This is an operation which they appear to be planning in the near future.

10. On October 13, 1972, between 10:50 p.m. and 11:25 p.m., a conversation between DELLA CAVA, GUARINO and JOHN CAPRA was overheard at 1023 Havermeyer Avenue. Much of the conversation involved GUARINO's various ailments, and medication he takes for them— seconals, barbiturates, hangover remedies. CAPRA teasingly referring to GUARINO, says, "This fucking drain would take junk and you know it." (i.e. GUARINO takes everything else, he would take heroin too). GUARINO replies, "kid, there's no junk to take"—(i.e. no heroin available), and all laugh; CAPRA replies, "For me it's suddenly '73" (i.e. that is when they expect the "panic"

to ease), and all laugh again.

11. It is clear from these conversations and activities that DELLA CAVA, GUARINO and JOHN CAPRA have had less than the normal quantities of narcotics to sell, but not for lack of trying. They have apparently sold at least two packages to JOHN BROWN (on September 24 and again sometime before the conversation of October 2, related in paragraph 7 above). They have attempted to purchase narcotics at $15,000 for a half-kilo (paragraph 7); they have attempted to have narcotics flown in, and are now planning to have narcotics shipped in (paragraph 9). Nevertheless they are apparently resigned to operating under the current "panic" for a while yet ("For me it's suddenly '73," CAPRA replied).

12. While MICHAEL CAPRA and LENNY FILIPPONE have not had much to say in the conversations above, they have been in the club with each other and with the three "senior partners" of the drug combine (DELLA CAVA, JOHN CAPRA, GUARINO) on a number of occasions. Since they are primarily "runners" and delivery men, and there has been little for them to deliver, they have not been too active; while they have been in the club frequently, their junior status apparently relegates them to a "be seen but not heard" role.

13. I respectfully submit that the information contained in this affidavit establishes probable cause to believe that STEPHEN DELLA CAVA, MICHAEL CAPRA, JOHN CAPRA, LEOLUCA GUARINO and LENNY FILIPPONE have been and are continuing to engage in the crimes of criminal possession of a dangerous drug as a felony and criminally selling a dangerous drug as a felony, in violation of Article 220 of the Penal Law, both of which are crimes punishable by imprisonment for more than one year.

I further respectfully submit that the information contained herein establishes probable cause to believe that DELLA CAVA, JOHN and MICHAEL CAPRA, GUARINO and FILIPPONE have other co-conspirators, accomplices, agents, suppliers, deliverers and customers in the commission of said crimes.

I further respectfully submit that the information contained herein establishes probable cause to believe that these five individuals and their co-conspirators, accomplices, agents, suppliers, deliverers and customers discuss, negotiate and transact narcotics purchases and sales inside the ground floor of the premises of 1023 Havermeyer Avenue, Bronx, New York.

I further respectfully submit that the information contained herein establishes probable cause to believe that the conversations of these five individuals with each other and with their co-conspirators, accomplices, agents, suppliers, deliverers and customers inside said premises will continue to constitute evidence of said crimes.

14. Authorization is therefore sought to continue to moniter, overhear and record the conversations of DELLA CAVA, GUARINO, FILIPPONE and JOHN and MICHAEL CAPRA inside 1023 Havermeyer Avenue. The conversations to be overheard, specifically, are those of these named individuals with each other and with their co-conspirators, accomplices, agents, suppliers, deliverers and customers, pertaining to illegal traffic in narcotics.

The interception of such conversations is essential if STEPHEN DELLA CAVA, JOHN CAPRA, MICHAEL CAPRA, LEOLUCA GUARINO, and LENNY FILIPPONE and their co-conspirators, accomplices, agents, suppliers and customers are to be successfully prosecuted. It is only by the interception of such conversations that it will be possible to identify their co-conspirators, ac-

complices, agents, suppliers and customers; to learn when and where DELLA CAVA, JOHN and MICHAEL CAPRA, GUARINO and FILIPPONE will be meeting with these other individuals to conduct narcotics transactions, so that surveillance can be maintained on these meetings and transactions; most important to apprehend DELLA CAVA, JOHN and MICHAEL CAPRA, GUARINO and FILIPPONE and/or one or more of their co-conspirators, accomplices, in possession of narcotics and in the act of selling narcotics.

15. I am not in possession of any information which would indicate that any of the conversations sought to be intercepted and overheard may be expected to come within any privilege under any applicable rule of law.

16. This investigation has been ongoing since the latter part of September, 1971, and for the reasons detailed above, it has been impossible to accumulate sufficient evidence against STEPHEN DELLA CAVA, JOHN and MICHAEL CAPRA, LEOLUCA GUARINO, LENNY FILIPPONE and their co-conspirators, accomplices, agents, suppliers, deliverers and customers through normal investigative techniques to have them prosecuted. My informant fears for his safety if he attempted to regain his role within this group.

Under these circumstances, I respectfully request that an order in the annexed form be issued by the Court.

17. The evidence detailed in the above paragraphs indicates that it is not possible to predict with certainty what particular time of day the above-described conversations may take place.

It is therefore respectfully requested that the annexed eavesdropping warrant be effective for a period of thirty days from the effective date and at any time during the day or night.

It is further requested that this order for interception not automatically terminate when the above-described type of communication has first been obtained. Considering the continuing nature of the criminal activity involved herein, it is important that the interception of conversations not terminate after the first conversation concerning narcotic drugs has been intercepted.

To my knowledge, no previous application for the order requested herein has been made to any other Court or Justice.

s/George M. Eaton
GEORGE EATON

Sworn to
October 18th, 1972

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-659

JOHN CAPRA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 501 F.2d 267. The opinions of the district court with respect to its suppression and pretrial publicity rulings (Pet. Apps. B, C, and E) are reported at 372 F.Supp. 600, 603 and 609; the district court's wire interception ruling (Pet. App. F) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1974, and a petition for rehearing was denied on September 27, 1974. By order dated October 18, 1974, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including November 26, 1974, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' convictions for substantive narcotics violations should be reversed because of the introduction of evidence derived from wire interceptions, part of which were held by the court of appeals to be unlawful, where the interceptions took place after the commission of the substantive offenses and the evidence derived from the interceptions related only to the conspiracy charge, which was reversed by the court of appeals.

2. Whether the court properly instructed the jury regarding the consideration of hearsay declarations of co-conspirators.

3. Whether petitioners have standing to challenge the search and seizure of a suitcase containing 5½ kilograms of heroin and 1 kilogram of cocaine that took place after they had sold the narcotics and relinquished control over them.

4. Whether publicity occurring at the time of petitioners' arrest warranted dismissal of the charges against them.

5. Whether the warrantless search of an automobile was justified on the facts of this case.

6. Whether petitioners were denied a fair trial by four instances of allegedly improper questioning by the prosecution.

STATEMENT

After a five-week jury trial in the United States District Court for the Southern District of New York, petitioners and co-defendant Robert Jermain were convicted of selling 3 kilograms of heroin, in violation of 26 U.S.C. (1964 ed.) 4705(a) and 7237 (b), and of distributing, and possessing with the intent to distribute, 5½ kilograms of heroin and 1 kilogram of cocaine, in violation of 21 U.S.C. 812, 841 (a)(1), and 841(b)(1)(A). Petitioners and co-defendants Jermain, George Harris, and Alan Morris were also convicted of conspiracy to violate federal narcotics laws, in violation of 18 U.S.C. 371. Petitioners were each sentenced to concurrent 15 year terms of imprisonment and to six years' special parole on the conspiracy and various substantive counts. Petitioners Capra and Guarino were sentenced in addition to a consecutive term of three years' imprisonment and six years' special parole, and to fines totalling $45,000 (Tr. Vol. 9, 75-76). After noting that some of the evidence admitted at trial to prove petitioners' participation in the conspiracy should have been suppressed, the court of appeals affirmed petitioners' convictions on the sub-

stantive counts and reversed their conspiracy convictions.[1]

The evidence, which is no longer in dispute, is detailed in the opinion of the court of appeals. It shows that petitioners formed an enterprise centered in New York for the massive marketing of heroin and cocaine, in which their functions were loosely but generally divided: Guarino secured drugs from importers, Capra acted as distributor, and DellaCava made deliveries. Later Joaquin Ramos, an admitted co-conspirator but not a defendant in this case, and co-defendant Jermain transferred drugs from DellaCava in New York to co-defendants Alan Morris and George Harris for sale in the midwest.

After Ramos's release from federal prison in 1969, he frequented the Havermeyer Social Club in the Bronx, at petitioners' invitation. The club was one of petitioners' fronts for the enterprise. Guarino offered to reestablish Ramos in the narcotics business, and during the period when Ramos was considering the proposition, he helped count and hide money which DellaCava brought into the club (Tr. 148-152). By the fall of 1969, Ramos and a partner were distributing a kilo of heroin each month.

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[1] The basis of the reversal of the conspiracy conviction (Pet. App. A23) was that some of the evidence admitted at trial to prove the conspiracy had been obtained by court-authorized wire interceptions, part of which the court of appeals held to be unlawful. The sentences of imprisonment that petitioners had received on the conspiracy charges were to run concurrently with those received on the substantive charges. The net result of the reversal was thus that Capra's and Guarino's fines were each reduced by $25,000.

Ramos's usual routine was to place orders with Guarino or Capra at the club and leave a car there, with a full tank of gasoline, so that DellaCava could use it to get the narcotics, and, after driving around New York City to insure that he was not being watched, return, leaving the narcotics in the trunk of the car for distribution by Ramos (Tr. 152-160).

Jermain, whose major customer was Harris, a Detroit drug dealer, entered into a partnership with Ramos in March 1970. On instructions from Capra, they developed a pattern of dealing in which Harris paid in advance of delivery, and Ramos or Jermain delivered the drugs to him or one of his agents (Tr. 185-188, 252-254, 267). In 1970, Ramos and Jermain established an additional outlet with another midwestern dealer, Alan Morris. In August 1970, Ramos delivered two kilograms of heroin to Morris in New York City. Morris had prepaid Ramos $48,000 for the heroin (Tr. 286-291).[2]

In early November 1970, Harris asked Ramos and Jermain to get him a kilogram of heroin. After Ramos discussed the matter with DellaCava, Jermain agreed to take care of the delivery of the heroin (Tr. 259-262). The following evening, Jermain gave two packages containing heroin to Harris and his associate, Earl Simms, who testified as a witness for the government (Tr. 1336-1339, 1566-1567). Ramos subsequently paid $24,000 to Capra and Guarino for

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[2] This sale was the subject of Count 2 of the indictment.

the heroin Jermain had delivered to Harris (Tr. 264).[3]

By 1971, Morris was placing orders every three or four months for approximately $150,000 worth of heroin (Tr. 278-286, 299-302). As their business expanded, Ramos and Jermain not only demanded payment in advance from Morris, but also refused to meet with him in New York City (Tr. 355-359, 370-376). Instead, Ramos or Jermain checked the packages of narcotics in public terminals and then forwarded the claim checks to Morris, who picked up the drugs without ever meeting the distributors face-to-face (Tr. 433-434, 443-444). One such sale—of five and one-half kilograms of heroin and one kilogram of cocaine, consummated in October 1971 at the Toledo, Ohio train station—led to the arrest of Ramos.[4]

The growth of the enterprise, as outlined by Ramos and corroborating witnesses (Tr. 1330-1334, 1336-1339, 1566-1567), was further described by narcotics agents who had overheard conversations relating to the conspiracy while engaged in electronic surveillance that had initially been directed at one Joseph DellaValle, the owner of the tavern out of which DellaCava operated. This surveillance commenced nearly two months after the completion of the last transaction charged in the substantive counts.

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[3] This sale was the subject of Count 3 of the indictment.

[4] This sale was the subject of Counts 4 and 5 of the indictment.

ARGUMENT

1. The court of appeals held that "none of the evidence resulting from the illegal wiretaps was used to prove the guilt of [petitioners] on the substantive charges" (Pet. App. A23-A24), the last of which was committed about two months before the interceptions commenced. Accordingly, while it suppressed certain of this wire interception evidence and reversed the conspiracy conviction to which the evidence related, the court below affirmed the substantive convictions. This ruling was correct and petitioners' contentions relating to the wire interception evidence have no substance.

a. Petitioners assert that their connection with witness Ramos was first discovered in October 1972 as a result of a chain of events traceable to electronic surveillance undertaken ten months earlier, which the court of appeals held to have been unlawful. Therefore, they submit that all of Ramos's testimony at trial should be suppressed as "fruit of the poisonous tree."

We rely on the finding of the court below, which is supported by the testimony at trial, that "[t]here is no indication in the record nor was there a claim by any of the defendants that the police identified Ramos or asked him to testify as a result of evidence uncovered by the wiretaps" (Pet. App. A24).[5]

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[5] Petitioners argue that the court of appeals erred in concluding that they did not claim that the identification of Ramos resulted from an illegal interception, pointing to counsel's statement at trial that "My chief concern * * * is

Undisputed testimony about police visual surveillance of witness Ramos, which took place before any of the telephone monitoring, shows that on November 5, 1970, Ramos was followed from a restaurant to the Havermeyer Social Club, which petitioner DellaCava entered shortly thereafter. Approximately half an hour later, Ramos and DellaCava were observed leaving the club together (Tr. 1330-1334). On December 2, 1970, Ramos made two trips to the Havermeyer Social Club, where he spent most of the evening. During his stay there, at approximately 9:00 p.m., co-defendant Jermain entered the club; at approximately 10:00 p.m., petitioner DellaCava drove up in a green Ford and entered the club (Tr. 1041, 1111-1112). On December 7, 1970, co-defendant Jermain was observed meeting Ramos and driving him to the Havermeyer Social Club. After a brief period of time in the club, both men went to a restaurant

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that the witness Ramos was discovered as a result of some illegality or some illegality may have been exercised with regard to witness Ramos." (Pet. 89). But this bare suggestion that there might be "some illegality" which led to the discovery of Ramos is far from a specific claim that the interception led to his identification. Even now, petitioners base their claim simply on the assertion that, since Ramos agreed to cooperate with this investigation one month after references to his part in the conspiracy were overheard, there is a "reasonable inference" that the monitoring led to the identification and agreement to testify (Pet. 85). As we note, *infra*, however, the record clearly establishes police awareness of Ramos's connection with petitioners before the interception and provides no basis for the speculation that his agreement to cooperate was motivated by the interception, rather than by the conclusion of related state proceedings against him, or, indeed, by any other motivation.

where they parked directly across the street from the green Ford that DellaCava had been driving on December 2, 1970 (Tr. 1041, 1113). Approximately forty-five minutes later, Jermain left the restaurant and picked up co-defendant Morris. A few minutes later, DellaCava left the restaurant with five people (Tr. 1041-1042). There was also testimony that, during the first quarter of 1971, Capra was observed on approximately six occasions driving a car that was being watched in connection with the investigation of Ramos and Jermain (Tr. 2964, 2992-2996).

From this testimony it is clear that the police had identified petitioners and were aware of their connection with Ramos before the monitoring of DellaValle started.[6] Therefore, petitioners' unsupported assertion that Ramos's testimony is a fruit of the suppressed wire interceptions is erroneous.[7]

b. Petitioners assert that the wire interception evidence, part of which was suppressed by the court below (Pet. App. A8-A16), was "the real corroborative evidence of Ramos' testimony concerning petitioners' roles as suppliers" (Pet. 81). Therefore, they contend that its introduction at trial requires a new trial or re-sentencing.

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[6] Petitioners were not known to be associates of DellaValle. This explains what petitioners call the government's concession (Pet. 17 n. 10) that the identities of petitioners were not known to the police when the first wire interception order was issued on December 8, 1971.

[7] In this factual setting, there is no reason to reach the question whether the testimony of a live witness acting through his individual volition and choice should ever be considered tainted as the fruit of an improper interception.

The court below correctly concluded, however, that the record shows that Ramos's testimony was independently corroborated (Pet. App. A24). It was corroborated in detail by police visual and photographic surveillance evidence (*e.g.*, G. Exs. 22, 24) by airline, hotel and telephone toll records (*e.g.*, G Exs. 26, 39, 42, 44, 46, 47, 76, 77, and 134A), and by the testimony of co-conspirators Earl Simms and Joseph Conforti.

Although the prosecution's theory was that petitioners, as suppliers, were careful to hire others to take the risks associated with the actual handling of the narcotics, first hand evidence, other than the monitored telephone conversations, reveals their personal involvement. Ramos testified that DellaCava's job was to retrieve the narcotics from their hiding place for each sale (Tr. 158, 741), and that Capra and Guarino handled the finances, setting the prices to be paid and dividing the profits (Tr. 149, 151).

DellaCava's direct contact with the heroin was corroborated by the traces of heroin and the machine for sealing plastic bags found in his car. Capra's involvement in the financial end of the business was corroborated by the itemized bill for the Toledo, Ohio sale of five and one-half kilos of heroin and one kilo of cocaine (G. Ex. 21), which other evidence showed was in his handwriting (G. Ex. 135). Ramos's testimony about Capra's personal involvement was also corroborated by Conforti's testimony that he heard Capra tell co-conspirator Caruso to give Conforti materials to dilute or "cut" heroin (Tr. 2420-2424).

Conforti also testified that he heard Guarino tell co-conspirator Sperling that "we need the money to get this deal going," just before Sperling sent Conforti to pick up $30,000 (Tr. 2428). He further testified that on another occasion when he was summoned to Sperling's house with cutting materials, Conforti heard Guarino tell Sperling, "Things are looking up, we're going to have a good year" and that a "connection" had been made (Tr. 2445).[8]

Thus, the wire interception evidence only corroborated a wealth of other evidence establishing petitioners' guilt on the substantive counts, and any error in admitting this evidence was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18.

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[8] Even though petitioners' conspiracy convictions were reversed, co-conspirator declarations were nevertheless admissible and properly admitted on the substantive counts. It is well settled that, regardless of whether a conspiracy is charged in the indictment, acts and statements of co-conspirators made in furtherance of the conspiracy are admissible at trial against other co-conspirators. *Anderson* v. *United States*, 417 U.S. 211, 218; *United States* v. *Annunziato*, 293 F.2d 373, 378 (C.A. 2), certiorari denied, 368 U.S. 919; *United States* v. *Olweiss*, 138 F.2d 798, 800 (C.A. 2), certiorari denied, 321 U.S. 744. Here, the evidence showed that petitioners did not personally handle the delivery of narcotics to customers but acted through intermediaries. Therefore, evidence of their participation in the substantive counts was necessarily circumstantial, and evidence of prior and subsequent transactions by petitioners which showed the continuing nature of their joint venture was particularly appropriate to prove knowledge, intent, and modus operandi. *Lisenba* v. *California*, 314 U.S. 219, 227; *United States* v. *Turner*, 423 F.2d 481, 483-484 (C.A. 7), certiorari denied, 398 U.S. 967.

2. Petitioners contend that the trial court improperly instructed the jury regarding its consideration of hearsay evidence (Pet. 143-150).

In its charge, the district court instructed the jury that each defendant's participation in the conspiracy must be established by evidence as to his own words, actions, or conduct and that the jury had to find that a defendant was a member of the conspiracy by a preponderance of non-hearsay evidence before it could consider hearsay evidence against him in determining his guilt beyond a reasonable doubt (Tr. 3941-3942).[9]

Petitioners, who do not contend that the non-hearsay evidence was insufficient to permit the introduction of acts and statements of co-conspirators, argue that the judge erred in not giving these instructions at the time the hearsay evidence was first admitted and throughout the trial, rather than just prior to the jury deliberations. In support of this contention, petitioners point to language in *Lutwak* v. *United States*, 344 U.S. 604, 618-619, concerning a declaration made after the conspiracy had ended:

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[9] Petitioners claim that this instruction permitted the jury to apply a preponderance test to determine guilt or innocence on the conspiracy charge (Pet. 147). The court of appeals' reversal of the conspiracy convictions cured any such error in the instruction. In any event, we note that on at least three occasions the jury was instructed that membership in the conspiracy must be established beyond a reasonable doubt in order for them to convict on the conspiracy count (Tr. 3938, 3941-3942, 4081). Moreover, on five other occasions the jury was instructed on the reasonable doubt standard with respect to the charges in general and the particular elements of the various counts (Tr. 3903, 3905, 3917, 3923, 3932).

> In the trial of a criminal case for conspiracy, it is inevitable that there shall be * * * evidence as to declarations that is admissible as against all of the alleged conspirators; there are also other declarations admissible only as to the declarant and those present who by their silence or other conduct assent to the truth of the declaration. These declarations must be carefully and clearly limited by the court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them * * * [*i.e.*] to whom they have been restricted and in some instances for what specific purpose.

The Court in *Lutwak* was concerned that declarations made after the conspiracy had ended, "admissible only as to the declarant and those present who * * * assent to the truth of the declaration," be accompanied by an instruction at the time of their admission into evidence appropriately limiting the jury's consideration of that evidence. Contrary to petitioners' suggestion, the Court did not hold that declarations and acts like those in the instant case, made in furtherance of the conspiracy and admissible against all of the conspirators whose participation in the conspiracy was established, need be accompanied by such an instruction. In these circumstances, such an instruction would be both confusing and incorrect.[10]

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[10] Similarly, *United States* v. *Apollo*, 476 F.2d 156 (C.A. 5), cited by petitioners (Pet. 144), is inapposite. There, the extrajudicial statements of alleged co-conspirators linking

3. Petitioners contend that the narcotics seized from a suitcase Ramos checked at the baggage room of the Toledo, Ohio railroad station should have been suppressed as the result of an illegal search and seizure. The court of appeals and the district court properly rejected this claim, in opinions upon which we rely (Pet. App. A5-A8, E1-E10).

The evidence at the suppression hearing and the trial showed that after Morris paid Ramos $150,000 for a narcotics delivery,[11] Ramos checked a suitcase containing the narcotics at the baggage room and mailed the claim check to Morris. The baggage attendants' suspicions were aroused by Ramos's manner[12] and by the weight and rustling sound of the suitcase. When the suitcase was not promptly retrieved, the attendants consulted with a railroad police agent, Blevins, who was employed by the railroad to protect railroad property. They told him they feared the bag might contain a bomb, and the three men decided to open the suitcase to make sure it was

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the defendant with a conspiracy were made at a time when the conspiracy and the defendant's connection with it were not firmly established. The court held that it was error to tell the jury that "connection with conspiracy must of necessity be established by some hearsay in this kind of case", and that instead limiting instructions should have been given (*id.* at 163).

[11] This was petitioners' share of the proceeds. Jermain and Ramos were to split the balance due (Pet. App. A7-A8).

[12] He was "nervous and tense" and "aggressively" rejected the agent's suggestion that he use a coin locker, which would have been more usual, since he intended to leave the suitcase for more than a few hours (Pet. App. E3-E4).

safe (Pet. App. E4). When the baggage attendants and Blevins were unable to open the suitcase, Blevins called a city police detective, Ryan, reported his concern, and asked for assistance in opening the suitcase. Ryan and two other policemen came to the station and picked the locks on the suitcase. One of the baggage agents then opened it and discovered the narcotics. Morris was arrested with an accomplice in the station after the accomplice claimed the bag and delivered it to Morris (Pet. App. E5).

After consideration of this evidence, the courts below concluded that petitioners here had no standing to challenge the search and seizure (Pet. App. E2-E3, A7-A8). They had been fully paid for the narcotics and had completed their part in the plan for its delivery, and thus they no longer had a sufficient possessory interest in the suitcase or its contents upon which to base their claim. See *Brown* v. *United States*, 411 U.S. 223, 228-230. In any event, both courts noted that the search was essentially a private one by the railroad employees in the proper exercise of their responsibility to protect the railroad's property, not a search for evidence of a crime by law enforcement officials (Pet. App. E6-E7, A25).

There is no need for further review of the concurrent holdings of both courts below, which turn on the particular facts of this case, and thus present no issues of continuing importance.

4. Petitioners contend that this Court should dismiss all charges against petitioners because of publicity at the time of their arrest. We rely for re-

sponse to this contention on the opinion of the court below. As the court stated (Pet. App. A19):

> The trial court correctly held that there was no showing of prejudice in this case. Absent proof of bias on the part of individual members of a jury, reversal, because of extensive publicity adverse to the accused, is required where, after reading or hearing it, a resulting conclusion of guilt in the minds of the general public would be practically certain, *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966); *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), or where improper pressure on a jury was clear from the record itself, *Estes* v. *Texas*, 381 U.S. 532 (1965), neither of which the trial court found here.

5. Petitioners contend that the warrantless search of petitioner DellaCava's car when he was arrested following his indictment—and the subsequent vacuuming of a bag containing almost $14,000 in cash found in the car—were improper, and thus that the evidence obtained thereby should have been suppressed.[13]

The court of appeals concluded that the agents had probable cause to believe that the car was being used to transport narcotics, based on their prior knowledge of DellaCava's activities and of the charges in the indictment under which he was arrested (Pet.

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[13] Only petitioner DellaCava has standing to raise this issue. *Alderman* v. *United States*, 394 U.S. 165. The car search revealed a machine for sealing plastic bags, as well as the bag full of money. The vacuuming disclosed traces of heroin (Pet. App. A21).

App. A21). A warrantless search of an automobile, either immediate or delayed, based on probable cause to believe that it contains contraband or evidence of a crime does not violate the Fourth Amendment, *Carroll* v. *United States*, 267 U.S. 132; *Chambers* v. *Maroney*, 399 U.S. 42.[14] The search of the bag found in the car was similarly proper. *United States* v. *Soriano*, 497 F.2d 147 (C.A. 5). Although petitioners challenge the court's finding that, under the particular circumstances here, the officers had probable cause to search the car, there is no need for further review of this narrow and essentially factual issue. In any event, in light of the other overwhelming evidence of guilt, any error was clearly harmless.

6. Petitioners contend (Pet. 150-153) that they were denied a fair trial by four instances of allegedly improper questioning by the prosecutor. On their face, the questions, which appear at Pet. 150-151, can hardly be considered inflammatory. Moreover, the court sustained objections to three of the questions, and, as petitioners note (Pet. 151), the judge instructed the jury that "a question is not evidence." The fourth instance of allegedly improper questioning related to the sale of heroin to co-defendant Morris in brown paper bags (Tr. 987). After Ramos

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[14] Since the officers had probable cause to search the car, it is not necessary to conclude further, as did the courts below, that the search was justified in anticipation of the forfeiture of the car.

The fact that part of that search occurred some time later is not significant. *Chambers* v. *Maroney, supra; United States* v. *Edwards*, 415 U.S. 800, 806-809.

testified about the price paid for the bags, he was asked whether he ever had any conversation with DellaCava, Guarino, or Capra about what the bags contained. Ramos answered that conversations regarding the bags related to heroin. After objection by defense counsel, the time frame for these discussions was limited to that charged in the indictment (Tr. 988-989). As noted above, such testimony was properly introduced as petitioners' admissions that they knew Ramos was selling heroin to Morris.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 571159 125